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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TOTAL-TEL USA, and
WESTEL, INC.,
Complainants,

v.

NEVADA BELL TELEPHONE COMPANY,
Defendant.

File No. E-91-145

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: October 28, 1992; Released: November 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Communications Services, Inc., (CSI) and Metromedia Long Distance, Inc., (Metromedia), along with other complainants, filed the above-captioned formal complaint against Nevada Bell Telephone Company (Nevada Bell) seeking damages resulting from Nevada Bell's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On October 8, 1992, however, CSI and Metromedia filed a motion for partial dismissal requesting that they be dismissed from the complaint stating that they have settled with Nevada Bell.[1]

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that CSI's and Metromedia's Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

[1] While CSI and Metromedia requested a partial dismissal of the above-captioned proceeding, we note that they are the only two parties filing a complaint against Nevada Bell in File No. E-91-145. Accordingly, we will dismiss the complaint in its entirety.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
GAREY M WALLACE COMPANY,
LONG DISTANCE SERVICE, INC.,
NATIONAL TELESERVICES, INC.,
NTS COMMUNICATIONS, INC., and
VALU-LINE OF ST. JOSEPH, INC.,
Complainants,

v.

CONTEL OF ARKANSAS, INC.,	File No. E-91-160
CONTEL OF KANSAS, INC.,	File No. E-91-161
CONTEL OF MISSOURI, INC.,	File No. E-91-162
CONTEL OF PENNSYLVANIA, INC., and	File No. E-91-163
CONTEL OF VIRGINIA, INC.,	File No. E-91-164

Defendants.

ORDER

Adopted: October 28, 1992; Released: November 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Communigroup of K.C., Inc., Garey M Wallace Company, Long Distance Service, Inc., National Teleservices, Inc., NTS Communications, Inc., and Valu-Line of St. Joseph, Inc. (collectively "Joint Complainants"), along with Communications Services, Inc., filed the above-captioned formal complaints against defendants seeking damages resulting from defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On September 25, 1992, the Joint Complainants filed a motion for partial dismissal requesting that they be dismissed from the complaints. In support of their motion, the Joint Complainants state that they have either settled with defendants or have concluded that they did not purchase interstate access service from defendants during the relevant monitoring period.[1]

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Complainants' Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings are TERMINATED to the extent they relate to the claims of the Joint Complainants.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] While the Joint Complainants requested a partial dismissal of the above-captioned proceedings, we note that they are the only parties filing complaints against defendants in File Nos. E-91-160, E-91-161, and E-91-162. Accordingly, we will dismiss these complaints in their entirety. The claims of Long Distance Service, Inc. will be dismissed in File No. E-91-164 pursuant to this Order. In addition, Communications Services, Inc.'s claims have not been resolved in File Nos. E-91-163 and E-91-164.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
CONTACT AMERICA, INC.,
GAREY M WALLACE COMPANY,
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
NTS COMMUNICATIONS, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TOTAL-TEL USA, and
WESTEL, INC.,
Complainants,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-91-148

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: October 28, 1992; Released: November 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Garey M Wallace Company, NTS Communications, Inc., and Westel, Inc., (collectively "Joint Complainants"), along with other complainants, filed the above-captioned formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On September 25, 1992, the Joint Complainants filed a motion for partial dismissal requesting that they be dismissed from the complaint because they have settled with SWBT.

2. We are satisfied that partial dismissal of the complaint will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Complainants' Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED to the extent it relates to the claims of the Joint Complainants.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
GAREY M WALLACE COMPANY,
METROMEDIA LONG DISTANCE, INC.,
NTS COMMUNICATIONS, INC.,
RCI NETWORK SERVICES, INC.,
SCHNEIDER COMMUNICATIONS, INC.,
TELECOMMUNICATIONS SERVICES CORP. (T/A TELSAVE),
TELEPHONE ASSOCIATES LONG DISTANCE SERVICES, INC.,
U.S. LINK,
VALU-LINE OF ST. JOSEPH, INC., and
WESTEL, INC.,
Complainants,

v.

GTE NORTH INCORPORATED,	File No. E-91-165
GTE NORTHWEST INCORPORATED, and	File No. E-91-166
GTE SOUTHWEST INCORPORATED,	File No. E-91-167

Defendants.

ORDER

Adopted: October 28, 1992; Released: November 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Communigroup of K.C., Inc., Garey M Wallace Company, NTS Communications, Inc., RCI Network Services, Inc., Schneider Communications, Inc., Telecommunications Services Corp. (T/A TelSave), Telephone Associates Long Distance Services, Inc., U.S. Link, Valu-Line of St. Joseph, Inc., and Westel, Inc. (collectively "Joint Complainants"), along with other complainants, filed the above-captioned formal complaints against defendants seeking damages resulting from defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On September 25, 1992, the Joint Complainants filed a motion for partial dismissal requesting that they be dismissed from the complaints. In support of their motion, the Joint Complainants state that they have either settled with defendants or have concluded that they did not purchase interstate access service from defendants during the relevant monitoring period.

2. We are satisfied that partial dismissal of the complaints will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Complainants' Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings are TERMINATED to the extent they relate to the claims of the Joint Complainants.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS
COMPANY L.P.,
Complainant,

v. File No. E-89-142

THE CHILLICOTHE
TELEPHONE COMPANY,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: November 5, 1992; Released: November 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. Sprint Communications Company L.P. (Sprint) filed the above-captioned formal complaint against The Chillicothe Telephone Company (Chillicothe) seeking damages resulting from Chillicothe's alleged violations of the Commission's *Phase I Reconsideration Order*[1] and of Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a).

2. The parties have been conducting discussions, including consultation with members of the Enforcement Division, aimed at settling the complaint. A mutually agreeable settlement that satisfies all of Sprint's claims asserted or assertable in the above-captioned proceeding was reached. On November 3, 1992, complainant Sprint filed a motion for voluntary dismissal of the complaint, with prejudice.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Sprint's Motion for Voluntary Dismissal IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

[1] Investigation of Access and Divestiture-Related Tariffs, CC Docket No. 83-1145, Phase I, 102 FCC 2d 503 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Video/Multipoint, Inc. File No. 15183-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on the F-group
channels at Stockton, California

MEMORANDUM OPINION AND ORDER

Adopted: November 6, 1992; Released: November 16, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of Video/Multipoint, Inc. to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Stockton, California was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) filed a post-lottery Petition to Deny challenging the application.

2. *Petition to Deny.* In its Petition, the Committee alleges that Video/Multipoint, together with fifteen other MMDS applicants, engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names.[1] All sixteen of these applicants filed applications for Stockton.[2] The Committee contends that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial or business relationships among certain applicants,[4] the preparation of the applications under the direction and at the expense of Merrill Communications, and the similarities in technical and other information among the applications, and the Letter of Understanding between Video/Multipoint and Merrill Communications,[5] should lead the Commission to conclude that Video/Multipoint failed to disclose the identity of the real-party-in-interest to its application in violation of 47 C.F.R. Sec. 21.13(a).[6] In addition, the Committee contends that multiple applications were filed in violation of Section 21.901(d)(2),[7] also known as the one-to-a-market rule.[8]

3. *Discussion.* The allegations by the Committee concerning violations of the real-party-in-interest and one-to-a-market rules are not unique to this particular Video/Multipoint application. These allegations, as applied to Video/Multipoint, were considered and rejected by the Commission in *VCI*. For the reasons provided in *VCI*, we find the Committee's unsubstantiated evidence insufficient to establish the existence of real-party-in-interest and one-to-a-market rule violations.[9]

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[1] The Committee incorporated by reference the pleadings it filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987)(hereinafter cited as *VCI*) and against Video/Multipoint's Richmond application.

[2] These sixteen MMDS applicants are: B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corporation, Line of Site, Inc., Mettler Communications, Inc., Microwave Video, Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc., and Wireless Services, Inc.

[3] The Committee asserts that Merrill Communications recruited Video/Multipoint to file applications, provided assistance in preparation of the engineering, technical and nontechnical portions of Video/Multipoint's application and in its filing, at no expense to Video/Multipoint, and provided Video/Multipoint with the financial assurances it uses in its application.

[4] William H. Sauro, the owner of Video/Multipoint, is a business partner of Marshall M. Carpenter, Jr., an employee of Merrill Communications.

[5] This Letter of Understanding states that Bruce Merrill, through his company, Merrill Communications, will provide programming services to Video/Multipoint, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Merrill Communications.

[6] Section 21.13(a) of the Commission's Rules requires that an applicant must fully disclose the real-party-in-interest to the application. The test for determining whether a person is a real-party-in-interest is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974); *see KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub. nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987).

[7] The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications. At the time this MMDS application was filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

See, e.g., David Laustsen and Broadcast Data Corp., 3 FCC Rcd 2053 (Comm. Car. Bur. 1988).

[8] The Committee argues that Bruce Merrill or Merrill Communications as an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Stockton. If true, there would exist violations of both the real-party-in-interest and one-to-a-market rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053, 2054 (Comm. Car. Bur. 1988).

[9] *See, e.g., Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1536, 1573 (D.C.Cir. 1988)(hereinafter cited as *Astroline*); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (hereinafter cited as *Beaumont*); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394, 397 (D.C.Cir. 1985); *see also, Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989); *VCI*, 2 FCC Rcd 1895 (1987); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987). We note that the

4. *Conclusion.* Having carefully considered all the pleadings and the evidence submitted by the petitioner, we find that the allegations raised by the Committee when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact.[10] Accordingly, IT IS ORDERED that the Petition to Deny filed by The Committee for Fair MDS Lotteries IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Committee failed to submit an affidavit to support its allegations pursuant to 47 C.F.R. Sec. 309(d)(1). *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont*, 854 F.2d at 507.

[10] We remind Video/Multipoint that the condition imposed by the Commission in *VCI* remains applicable to any MMDS authorization issued to it.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-639

In re Applications of

TEXAS EDUCATIONAL BROADCASTING CO-OPERATIVE, INCORPORATED
Hornsby, Texas — File No. BPED-880401MG

THE UNIVERSITY OF TEXAS AT AUSTIN ON BEHALF OF TEXAS STUDENT PUBLICATIONS
Austin, Texas — File No.BPED-880722MA

For Construction Permit
for a New Noncommercial
Educational FM Station
on Channel 219A

MEMORANDUM OPINION AND ORDER

Adopted: November 6, 1992; Released: November 18, 1992

By the Review Board: BLUMENTHAL and GREENE. Board Member ESBENSEN absent.

1. The Board has before it the *Initial Decision*, 7 FCC Rcd 4069 (1992)(*I.D.*), of Administrative Law Judge Edward Luton (ALJ). Also before the Board are the exceptions and reply pleadings of both parties and a reply to the exceptions of Texas Educational Broadcasting filed by the Commission's Mass Media Bureau.

2. The *I.D.* held that the University was entitled to a "moderate" signal coverage preference while Texas Educational was entitled to a "moderate" preference for its proposal to integrate its cultural and educational objectives into its station operations. *Id.* , para. 48. Finding no advantage for either applicant under Section 307(b),[1] the ALJ decided the case under the "Share-Time" issue, and he declaimed[2]:

> The two parties shall share the use of the frequency. [Texas Educational] Broadcasting is authorized to operate on Monday, Wednesday, Friday and alternate Sundays. The University is authorized to operate on Tuesday, Thursday, Saturday and alternate Sundays.

EXCEPTIONS

3. The University excepts to the preference awarded to Texas Educational Broadcasting for its cultural and educational proposal; it claims that the ALJ erred in rejecting its "ascertainment" proffer. It also excepts to the share-time decree of the *I.D.*, maintaining that its signal coverage preference should carry the day.

4. Conversely, Texas Educational Broadcasting counters with a "creative" Section 307(b) argument to the following effect: Inasmuch as the University already holds the license for a much larger Class C FM facility in Austin, its own proposal would add a new "voice" in the Austin area,[3] thus advancing the statute's edict that frequencies be awarded so "as to provide a fair, efficient, and equitable distribution of radio service... ." In that regard, and citing the Commission's decision in *Valley Broadcasters*, 5 FCC Rcd 2785 (1990), Texas Educational theorizes that since the Commission has now held that no distinction should be drawn between commercial and non-commercial stations for Section 307(b) transmission purposes, it is consequently entitled to a "dispositive" statutory preference. Should that argument fail, Texas Educational supports its own share-time proposal, rejected by the ALJ, which would afford it the use of the frequency from 6:00 AM to 6:00 PM, weekdays, and all day Saturday and Sunday.

5. For its part, the Bureau submits that because Texas Educational has not contended that "Hornsby" is a separate "community" for licensing purposes,[4] no Section 307(b) preference accrues to either applicant. Citing the Commission's declaration in *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 259 (1991), that media diversification continues to be irrelevant in contests for noncommercial frequencies,[5] the Bureau argues, in essence, that Texas Educational has merely cast its contrary "diversification" postulate in "Section 307(b)" clothing. The Bureau supports the *I.D.* in finding no Section 307(b) advantage here for either applicant.

DISCUSSION

6. As the University points out, former Member Jerold L. Jacobs, speaking for the Board in *Black Television Workshop of Santa Rosa*, 65 RR 2d 34, 35-36 (Rev. Bd. 1984)(*late printing*) , opined that our noncommercial comparative criteria had become "vague," "amorphous" and

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[1] 47 U.S.C. Section 307(b).

[2] *I.D.* at para. 50 (footnote omitted).

[3] It is undisputed that the signal of the University's existing Class C noncommercial FM, which it would concurrently retain, totally encompasses the proposed signal of the smaller Class A facility here sought by both parties.

[4] The record reflects that Hornsby, Texas, 9 miles east of Austin, is an unincorporated area of Travis County comprised of 20 persons. *I.D.*, para. 6.

[5] The Commission was there responding to a Board certification of the question of media diversity under the facts of that case, *see* 5 FCC Rcd 3420 (Rev. Bd. 1990)(*Certification Order*). The Board's *Certification Order* had noted *Valley Broadcasting's* historic change in the treatment of commercial and non-commercial facilities. In light thereof, it queried whether it should consider the fact that one applicant there (Jimmy Swaggart Ministries), as of the record date, already held a license for a commercial radio station in Baton Rouge, plus a number of other radio facilities.

perhaps even "meaningless." He there respectfully urged review of those standards by the full Commission. The University also observes[6]:

> Indeed, the Commission has tentatively concluded that the noncommercial comparative issue, as currently framed, is so vague that it should be eliminated. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2669 (1992).

7. If Board Member Jacobs' 1984 expression of concern was accurate at *that* time, a proposition with which the Commission's 1992 *Reexamination* now seems in tentative accord, our own decision in *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577 (Rev. Bd. 1991)(cited in *Reexamination*, 7 FCC Rcd at 2669), highlighted even newer and deeper uncertainties in the noncommercial realm. First, the Board was there left to infer, by implication, that the "ascertainment" prong of the standard noncommercial comparative issue had been purposefully abandoned.[7] While the University's exceptions maintain, nonetheless, that the ALJ erred in rejecting its "ascertainment" proffer, the Bureau -- whose recent (and instant) *Hearing Designation Orders* gave rise to the abandonment inference[8] -- remains studiously silent on the issue in its reply pleading. Second, the Board's *Real Life* decision noted the conspicuous asymmetry between the policy change announced in *Valley Broadcasters* and the comparative signal coverage issue yet specified in this and all recent *Hearing Designation Orders;* to wit, whereas *Valley*, later fortified by *Channel 32 Broadcasting Co.*, 6 FCC Rcd 5188 (1991), *recon. denied*, 7 FCC Rcd 1694 (1992), stands squarely for a fresh policy in which *noncommercial* radio signals are to be included in any comparative signal coverage analysis in contests for new *commercial* facilities, the *Hearing Designation Order*[9] in this case (as in all other recent noncommercial proceedings[10]) continues to exclude *commercial* signals from the comparative analysis for *noncommercial* facilities.[11] Again, the Bureau's pleading does not suggest how these divergent lines can be reconciled. And, third, is Texas Educational's Section 307(b) argument that a grant to it will add a new "voice" to the community. Although the Board is estopped by the Commission's 1991 instruction in *Real Life* from considering media "diversity" in noncommercial comparative cases, *see* 6 FCC Rcd at 260,[12] we note that the Commission's *Reexamination* of our comparative criteria also invites comment on whether the agency "should use different or additional criteria" in noncommercial cases as well. *See* 7 FCC Rcd at 2669. The Board had hoped for a definitive resolution of some or all of these troublesome questions in any review of the Board's decision in *Real Life*, a case decided nearly eighteen months ago. *See supra* para. 7. The Commission, however, has not taken action on the applications for review still pending in that case, and it appears that the Commission may not reach the merits of *Real Life* in the immediate future.[13]

8. Given the foregoing, and in light of the fact that the *I.D.* orders a "share-time" arrangement that is not uncommon in these noncommercial comparative cases, *see Maricopa County Community College District*, 5 FCC Rcd 7614 (Rev. Bd. 1990), the Board believes it prudent for the parties to follow the example of the *Maricopa* applicants. There, also, neither applicant was enamored of the alternate-day, "share-time" resolution of the presiding ALJ, an arrangement first ordered by the Board in *New York University*, 19 FCC 2d 358, 374 (Rev. Bd. 1969), because of its view there that "the public would be well-served by the program offerings of both" applicants and a "share-time" grant "permits the less drastic solution of denying and granting in part both applications."

9. Recognizing the fundamental uncertainties in the original noncommercial comparative paradigm which have come as a result of recent Commission policy shifts, and despite many obstacles, the Board encouraged the *Maricopa* applicants to seek a mutually beneficial joint arrangement more amenable than the alternate-day, "share-time" construct long ago devised in *New York University*, and ordered by the ALJs in both *Maricopa* and the instant case. With a more realistic attitude, and the very able assistance of their respective communications counsel, the feuding *Maricopa* applicants were able to overcome their institutional prejudices and their adversarial obduracy to reach an amicable accord that rewarded the public (and themselves).[14] Because, in the now immortal phrase of Texan Ross Perot, the Board is certain that both instant applicants would much prefer "a government that comes *from* the people -- not *at* the people," and as in *Maricopa*, we issue a formal invitation to our instant contestants to commence negotiations toward a rapprochement that better meets their needs than the arrangement ordered in the *I.D.* Since we appreciate, as did the *New York University* Board, that these negotiations are not necessarily simple, *see* 19 FCC 2d at 376, merely because noncommercial applicants are not vying for potential "profits," we will afford our

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[6] University Exceptions at 7 (footnote omitted).

[7] *See Real Life*, 6 FCC Rcd at 2577-78 (Board *Decision*).

[8] *See id.*

[9] *See* 6 FCC Rcd 628, 629 (M. Med. Bur. 1991).

[10] *See, e.g., KCBX, Inc.*, 7 FCC Rcd 5283 (M. Med. Bur. 1992); *Sable Community Broadcasting Corp.*, 7 FCC Rcd 2356 (M. Med. Bur. 1992).

[11] The exclusion of commercial broadcast signals from comparative signal coverage analyses in noncommercial cases had its genesis in *New York University*, 10 RR 2d 215 (1967).

[12] The Board's *Certification Order* in *Real Life*, *see supra* note 5, cited not only *Valley Broadcasters*, but it recalled there its decision in *Advanced Broadcast Technologies*, 5 FCC Rcd 1960 (Rev. Bd. 1990). In *Advanced*, a *commercial* FM comparative proceeding, Penn State University had been charged with a substantial "diversification" demerit for its *noncommercial* facility, because a grant to Penn State would not add a new "voice" to the community. The Commission affirmed that holding in *Advanced*, *see* 5 FCC Rcd 7651 (1990); but the Commission's response to our *Certification Order* did not discuss or differentiate the holding in *Advanced*. *See Real Life*, *supra* para. 5 of this text.

[13] By *Order*, FCC 921-083, released October 15, 1992, the Commission's Office of General Counsel has asked one of the applicants (Jimmy Swaggart Ministries) to supply additional information concerning its finances, especially Swaggart's "nonliquid" assets.

[14] *See Maricopa*, 7 FCC Rcd 859 (Rev. Bd. 1992)(approving negotiated settlement).

competing applicants an ample opportunity to discuss, perhaps, a better way to resolve this case than that put forth by the ALJ.

10. ACCORDINGLY, IT IS ORDERED, That the above-captioned applicants SHALL FILE a Status Report with the Board no later than 90 DAYS from the public release of this *Memorandum Opinion and Order*, advising the Board of the progress of their negotiations.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ONE CALL
COMMUNICATIONS, INC.,
Complainant,

v.

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

File No. E-90-195

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: November 6, 1992; Released: November 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. One Call Communications, Inc. (One Call) filed the above-captioned complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 to December 31, 1988. On October 26, 1992, however, One Call filed a motion to dismiss the complaint stating that it has settled all claims against SWBT in this proceeding and requesting that the above-captioned complaint be dismissed with prejudice.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that One Call's request for dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

5. IT IS FURTHER ORDERED that One Call's Application for Review filed in the above-captioned proceeding IS DISMISSED.

[1] One Call filed an application for review of an order holding this complaint in abeyance. *Order*, 6 FCC Rcd 654 (Com.Car.Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: November 16, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Robert E. Allen
Chairman and Chief Executive Officer
American Telephone and Telegraph Company
32 Avenue of the Americas
New York, New York 10013-2412

Dear Mr. Allen:

This constitutes a letter of admonishment issued to American Telephone and Telegraph Company (AT&T) pursuant to authority contained in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), regarding certain credit card marketing practices.

BACKGROUND

On September 3, 1991, the Commission, in response to a number of complaints and inquiries from the public, initiated an inquiry into AT&T's introduction of telephone cards in the Card Issuer Identification (CIID) format. The staff's preliminary review of samples of AT&T's CIID card marketing literature sent out to consumers nationwide indicated what appeared to be a number of confusing or misleading statements. In particular, the literature referred to "government requirements" which mandated that AT&T issue new cards because it may no longer share calling card numbers with local telephone companies. The literature did not elaborate or otherwise identify any specific federal law, rule, or regulation imposing such a requirement. In addition, the literature included the following statement directed to calling card holders: "For your protection, destroy your old card." The staff concluded that the term "old" reasonably could be read by consumers as referring not only to cards issued individually by AT&T, but also to cards issued jointly with local exchange carriers (joint use cards) or by local exchange carriers individually.

As part of the inquiry, the staff requested AT&T to provide, *inter alia*, full explanations of the statements made in the literature as well as copies of all current CIID card marketing literature being sent to the public. The Commission staff also met with AT&T representatives on at least two occasions regarding its CIID card promotions and requested additional information for the record.

AT&T'S RESPONSE

In response to the staff's inquiry, AT&T explained that the "government requirement" language in the marketing literature refers to the court approved Plan of Reorganization requirement that AT&T's sharing of the "Billing Validation Application" of its card validation database with the Bell Operating Companies under Shared Network Facilities Agreements (SNFAs) end after December 31, 1991. According to AT&T, the expiration of the SNFAs meant that AT&T had to develop a separate database for its calling card information and the only way it could offer proprietary calling cards to its customers was through the provisioning of new calling cards with a proprietary numbering format. AT&T added, however, that:

> because the large majority of existing AT&T-issued calling cards bear numbers that are, or could be, shared with the BOCs, and thus that now are, or soon will be, available in ["Line Identification Databases" or "LIDBs"], AT&T has also had to adopt a different numbering format for those of its cards that it does not wish to be available to competing carriers through their access to LIDBs.[1]

With regard to statements in the literature urging holders of old cards to destroy them, AT&T stated that its issuance of new cards to replace the old ones was intended to ensure a smooth transition from the shared database environment that existed under the SNFAs to the separate database environment required by the Plan of Reorganization. AT&T stated that the process of substitution elected by AT&T was in strict accordance with the provisions of the Federal Reserve Board regulations which apply to the issuance of calling cards. *See* 12 C.F.R. § 226.12(a). As part of the replacement process, AT&T stated that it had been advising recipients to cease using and to destroy the old cards. AT&T maintained, however, that language to this effect was included in material sent only to current holders of cards issued by AT&T. AT&T adds that its card replacement efforts were in compliance with Federal Reserve Board regulations because a Federal Reserve Board staff interpretation specifically states that the card issuer need not physically retrieve the old card in these circumstances, so long as the cardholder is given reasonable instructions on destroying the old card. AT&T maintained that while certain of the old AT&T-issued calling cards may come within the Commission's definition of local exchange carrier joint use cards. AT&T's replacement of those cards also complied fully with Federal Reserve Board regulations. AT&T quoted further from the Federal Reserve Board staff ruling stating that "[w]here multiple entities share responsibilities with respect to a credit card issued by one of them, the entity that issued the card may replace it on an unsolicited basis. The other entity ... may not issue a card on an unsolicited basis in these circumstances."[2]

[1] AT&T Letter to Kathie A. Kneff of September 23, 1991, at 2.
[2] AT&T Letter at 3-4, quoting 55 Fed. Reg. 13,118 (1990).

DISCUSSION

We have carefully considered the evidence adduced as a result of this inquiry and find AT&T's explanations regarding its CIID card marketing practices to be seriously lacking in a number of respects. It appears that AT&T's marketing literature, with its vague references to government requirements, may have persuaded many consumers to unnecessarily destroy or discard otherwise valid calling cards issued by AT&T jointly with the BOCs or, in some cases, by the BOCs individually. The widespread consumer confusion and dissatisfaction that followed has led to a number of consumer complaints and inquiries to this Commission, members of Congress and other state and federal agencies. We find that AT&T's reference to "government requirements" in its literature would be understandably confusing to most of the literature's intended readers. In particular, the unequivocal directive to "destroy" existing cards was overly broad and unqualified. AT&T could have easily avoided the controversy it has generated by making more precise, less sweeping, declarations in implementing its card replacement plans. We believe that AT&T reasonably should have realized that many members of the general public holding telephone credit cards issued by local exchange carriers individually or in shared use with AT&T, were, or could readily have been, misled into destroying otherwise valid cards to their detriment as well as the detriment of other issuers of telephone credit cards that compete with AT&T in this market.

AT&T may be correct in its claim that Federal Reserve Board regulations permitted it to issue the new CIID cards on an unsolicited basis and also required it to void old cards in some way. There is no plausible basis, however, for reading the Federal Reserve Board regulations or the court approved Plan of Reorganization to require AT&T to issue new cards. The regulations only governed AT&T's choices once its unilateral business decision to issue new cards had been reached. In implementing this business decision, AT&T could have given far clearer instructions to consumers regarding the continued validity of cards issued either jointly with the BOCs or by the BOCs individually and regarding AT&T's reasons for offering the new cards. In today's telecommunications marketplace, with numerous service providers competing to serve consumers through calling cards and other long distance services, AT&T reasonably should have anticipated the customer confusion created by the way it handled the replacement of its old cards and the potential impact its practices could have on competing calling card issuers.

Although the record in this case does not support a finding that AT&T violated Section 201(b) of the Communications Act,[3] we nevertheless find that AT&T's actions in marketing its CIID card warrant a strong admonition.

We expect AT&T to take remedial steps to assure that persons who may have been misled by its prior marketing action promptly receive correct information regarding the validity and use of existing calling cards whether issued by AT&T individually or in shared use with the BOCs. Such remedial action might include, for example, the possible preparation and distribution of corrective billing inserts. We expect AT&T to take such actions as necessary to ensure that dissemination of misleading information with respect to telephone company calling cards is not repeated. In this regard, we note that AT&T has represented to the staff that it has revised its CIID card marketing literature to delete any confusing or misleading provisions and has submitted copies of the revised literature. AT&T has also advised the staff that it is no longer issuing CIID cards on an unsolicited basis to current holders of AT&T's line-based calling cards. Nevertheless, we caution AT&T that further actions of the nature described herein may result in a finding that Section 201(b) has been violated and may lead to show cause or forfeiture proceedings.

This letter was adopted by the Commission on November 3, 1992.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

[3] Section 201(b) of the Act states in pertinent part that "all charges, practices, classifications, and regulations for and in connection with such communications service shall be just and reasonable..." 47 U.S.C. § 201(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-72

In the Matter of

Amendment of Section 73.202(b), RM-7928
Table of Allotments,
FM Broadcast Stations.
(Hatteras, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 5, 1992; Released: November 17, 1992

By the Chief, Allocations Branch:

1. At the request of Hurricane Communications ("petitioner"), the Commission has before it the Notice of Proposed Rule Making, 7 FCC Rcd 2095 (1992), proposing the substitution of Channel 233C1 for Channel 232A at Hatteras, North Carolina, and the modification of Station WVAV's construction permit to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 233C1 for Channel 232A at Hatteras since it will provide the community with an additional wide coverage area FM channel and enable Station WVAV to expand its service area. Channel 233C1 can be allotted to Hatteras in compliance with the Commission's minimum distance separation requirements at the transmitter site specified in Station WVAV's construction permit.[1] As proposed, we will also modify Station WVAV's construction permit to specify the higher class channel.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hatteras, North Carolina	233C1, 246C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Hurricane Communications for Station WVAV, IS MODIFIED to specify operation on Channel 233C1, in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Hurricane Communications, permittee of Station WVAV, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 233C1 at Hatteras are North Latitude 35-15-38 and West Longitude 75-35-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-99

In the Matter of

Amendment of Section 73.202(b), RM-7971
Table of Allotments,
FM Broadcast Stations.
(Rock Valley, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 5, 1992; Released: November 17, 1992

By the Chief, Allocations Branch:

1. At the request of Robert M. Mason ("petitioner"), the Commission has before it the Notice of Proposed Rule Making, 7 FCC Rcd 2847 (1992), proposing the substitution of Channel 295C3 for Channel 295A at Rock Valley, Iowa, and the modification of Station KQEP's construction permit to specify operation on the higher class channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 295C3 for Channel 295A at Rock Valley since it could provide the community with a wide coverage area FM channel and enable Station KQEP to expand its service area. Channel 295C3 can be allotted to Rock Valley in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.3 kilometers (9.5 miles) north to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify Station KQEP's construction permit to specify operation on Channel 295C3 in lieu of its present Channel 295A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Rock Valley, Iowa	295C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Robert M. Mason for Station KQEP, Rock Valley, Iowa, IS MODIFIED to specify operation on Channel 295C3, in lieu of Channel 295A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Robert M. Mason, permittee of Station KQEP, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 295C3 at Rock Valley are North Latitude 43-20-27 and West Longitude 96-18-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-53

In the Matter of

Amendment of Section 73.202(b), RM-7936
Table of Allotments,
FM Broadcast Stations.
(Edmond, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 5, 1992; Released: November 17, 1992

By the Chief, Allocations Branch:

1. At the request of Porter H. Davis, d/b/a Life Broadcasting, Inc. ("petitioner"), the Commission has before it the Notice of Proposed Rule Making, 7 FCC Rcd 1999 (1992), proposing the substitution of Channel 250A for Channel 249A at Edmond, Oklahoma, and the modification of Station KTNT-FM's license to specify operation on the alternate Class A channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 250A for Channel 249A at Edmond since it could enable Station KTNT-FM to operate with maximum Class A facilities of 6 kW. Channel 250A can be allotted to Edmond in compliance with the Commission's minimum distance separation requirements at Station KTNT-FM's presently licensed site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Edmond, Oklahoma	250A

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Porter H. Davis d/b/a Life Broadcasting, Inc., for Station KTNT-FM, Edmond, Oklahoma, IS MODIFIED to specify operation on Channel 250A in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 250A at Edmond are North Latitude 35-34-11 and West Longitude 97-30-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-146

In the Matter of

Amendment of Section 73.202(b), RM-8019
Table of Allotments,
FM Broadcast Stations.
(Mammoth Lakes, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 5, 1992; Released: November 17, 1992

By the Chief, Allocations Branch:

1. The Commission considers herein the Notice of Proposed Rule Making, 7 FCC Rcd 4415 (1992), issued in response to a petition for rule making filed by Mammoth Mountain FM Associates, Inc. ("petitioner"), licensee of Station KMMT(FM), Channel 292A, Mammoth Lakes, California, proposing the substitution of Channel 293B1 for Channel 292A and modification of its license accordingly to specify the higher powered channel. Petitioner filed supporting comments stating its intention to apply for Channel 293B1 if allotted to Mammoth Lakes, as requested.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 293B1 for Channel 292A at Mammoth Lakes since it could provide the community with an expanded coverage area FM service. Therefore, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Mammoth Mountain FM Associates, Inc. for Station KMMT(FM), as requested. As stated in the Notice, Channel 293B1 can be allotted to Mammoth Lakes at the petitioner's currently authorized site,[2] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Mammoth Lakes, California	293B1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Mammoth Mountain FM Associates, Inc. for Station KMMT(FM), IS MODIFIED to specify operation on Channel 293B1 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Mammoth Mountain FM Associates, Inc., licensee of Station KMMT(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Mammoth Lakes, California.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the Notice, petitioner's request, although signed, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has done so.

[2] Coordinates used for Channel 293B1 at Mammoth Lakes are 37-37-40 and 119-01-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-247

In the Matter of

Amendment of Section 73.202(b) RM-8098
Table of Allotments,
FM Broadcast Stations.
(Christiansted, Virgin Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 5, 1992; Released: November 17, 1992

Comment Date: January 7, 1993
Reply Comment Date: January 22, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Clayton Knight ("petitioner"), requesting the allotment of Channel 285A at Christiansted, Virgin Islands, as its seventh local FM transmission service.[1] Petitioner provides an engineering study in support of the proposal and states he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 285A at Christiansted, Virgin Islands, since it could provide the community with its seventh local FM transmission service. A staff engineering analysis reveals that Channel 285A can be allotted to Christiansted in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.0 kilometers (5.0 miles) west of the community.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Christiansted, Virgin Islands	211A, 228B, 236B, 258B, 262B, 291B	211A, 228B, 236B, 258B, 262B, 285A 291B

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 7, 1993,** and reply comments on or before **January 22, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Clayton Knight
Box 1239
Kingshill, St. Croix
U.S. Virgin Islands 00851
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

[1] Although petitioner's request indicates that the original copy of his proposal was signed, he failed to include an affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any documentation filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to rectify this omission in his comments.

[2] The coordinates for Channel 285A at Christiansted are North Latitude 17-45-00 and West Longitude 64-46-50.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-212

In the Matter of

Amendment of Section 73.202(b),	RM-7727
Table of Allotments,	RM-7799
FM Broadcast Stations.	
(Kurten and College Station, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 7, 1992; Released: November 17, 1992

By the Chief, Allocations Branch:

1. At the request of Kurten Broadcasting Company ("petitioner"), the Commission has before it the Notice of Proposed Rule Making, 6 FCC Rcd 4373 (1991), proposing the allotment of Channel 245A to Kurten, Texas, as the community's first local FM service. Texas Classical Radio, Inc. ("Texas Classical") and petitioner filed counterproposals.[2] Clear Channel Communications filed opposing comments and responsive comments to the petitioner's counterproposal. Texas Classical filed reply comments. After the close of the comment period, petitioner filed a request for withdrawal of its petition for rule making and counterproposal pursuant to a settlement agreement between KRTS, Inc., M.S. Stude, F.W. Hannel and petitioner. Texas Classical filed a request for partial withdrawal of its documents.[3] No other expressions of interest were filed.

2. In accordance with Commission policy, we will grant petitioner's request for withdrawal of its rule making proposal and counterproposal.

3. IT IS ORDERED, That the petition for rule making of Kurten Broadcasting Company, seeking the allotment of Channel 245A to Kurten, Texas, (RM-7727), IS DISMISSED.

4. IT IS FURTHER ORDERED, That the counterproposal filed by Kurten Broadcasting Company to allot Channel 245A at College Station, Texas, (RM-7799), IS DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of College Station has been added to the caption.

[2] In its counterproposal, petitioner requested the allotment of Channel 245A to College Station, Texas, as that community's second FM service. Public Notice of petitioner's counterproposal (RM-7799) was given on September 11, 1991, Report No. 1860. Texas Classical's counterproposal, which requested the substitution of Channel 246C for Channel 246C1 at Cleveland, Texas, was unacceptable for consideration and therefore was not placed on public notice. Texas Classical filed an identical counterproposal in MM Docket No. 91-172. That counterproposal was placed on public notice and will be considered in the context of MM Docket No. 91-172.

[3] Texas Classical requested withdrawal of its comments and counterproposal, as well as its reply comments filed September 27, 1991, to the extent that language in the pleadings contains factual or legal allegations of misconduct against Roy E. Henderson. Affidavits were filed by David W. Nichols, a corporate officer of Texas Classical and Roy E. Henderson stating that no consideration was received in exchange for their withdrawals pursuant to Section 1.420 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-147

In the Matter of

Amendment of Section 73.202(b), RM-7951
Table of Allotments,
FM Broadcast Stations.
(Fruitland and Weiser, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 8, 1992; Released: November 17, 1992

By the Chief, Allocations Branch:

1. At the request of Treasure Valley Broadcasting Company ("petitioner"), the Commission has before it the Notice of Proposed Rule Making, 7 FCC Rcd 4419 (1992), proposing the substitution of Channel 258C1 for Channel 257A at Weiser, Idaho, and the reallotment of Channel 258C1 from Weiser to Fruitland, Idaho. Petitioner also requests the modification of Station KWEI(FM)'s license to specify Fruitland, Idaho, as its community of license. Petitioner filed comments restating its intention to apply for Channel 258C1 at Fruitland, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 258C1 for Channel 257A and reallotting the channel from Weiser to Fruitland, Idaho, and modifying Station KWEI(FM)'s license to specify Channel 258C1 at Fruitland. Petitioner has shown that the reallotment of the channel from Weiser to Fruitland will result in a preferential arrangement of allotments. Fruitland will receive its first local transmission service, while Weiser will continue to receive service from Station KWEI(AM). Channel 258C1 can be allotted to Fruitland in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.3 kilometers (3.9 miles) south.[1] Channel 258C1 at Fruitland would be short-spaced to Channel 261A, Station KQXR-FM, Payette, Idaho. However, Station KQXR(FM) was ordered in MM Docket No. 82-665 to specify operation on Channel 262C1.[2] Therefore, the grant of an authorization for Channel 258C1 at Fruitland, Idaho, may be withheld until Station KQXR(FM) is authorized on Channel 262C1 at Payette, Idaho. As requested, we will modify the license for Station KWEI(FM) to specify Fruitland as its community of license on Channel 258C1, in accordance with Section 1.420(i) of the Commission's Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Fruitland, Idaho	258C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Treasure Valley Broadcasting, Inc., for Station KWEI(FM), Weiser, Idaho, IS MODIFIED, to specify operation on Channel 258C1 in lieu of Channel 257A at Fruitland, Idaho, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Treasure Valley Broadcasting Company, licensee of Station KWEI(FM) is required to submit a rule making fee in addition to the fee required for the application to effect the change of community of license.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 258C1 at Fruitland are North Latitude 44-03-44 and West Longitude 116-54-22.
[2] Miller-Kohl Broadcasting, Inc., has filed an application (BPH-920824ID) for Station KQXR(FM), Channel 262C1, Payette, Idaho.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-258

In the Matter of

Amendment of Section 22.922 of the Commission's rules to permit limited transfers and assignments of applications in Rural Service Areas

REPORT AND ORDER

Adopted: November 3, 1992; Released: November 17, 1992

By the Commission:

I. INTRODUCTION

1. On May 30, 1990, the Commission adopted a Notice of Proposed Rule Making (Notice) in the above-referenced Docket.[1] In that Notice, the Commission proposed to amend Section 22.922 of the rules, 47 C.F.R. § 22.922, to exempt cellular applicants from various limitations on transfers and assignments of interests in Rural Service Area (RSA) cellular radio applications. We have received eight comments and three reply comments.[2] After carefully considering these comments, we find that applying the proposed exemptions for non-wireline carriers to both Block A and Block B cellular carriers will relax filing burdens and expedite service to the public in the RSA cellular markets.

II. BACKGROUND

2. In *Third Report and Order*[3] the Commission found that allowing transfers, assignments, or other alienations of pending applications tended to delay service to the public because such transactions disrupt orderly application processing procedures. The Commission stated that ownership changes require that the Commission issue a new public notice and restart the application processing cycle, absent a waiver of the cut-off rules. The Commission, therefore, adopted Section 22.922 to prohibit the alienation of any interest in an RSA application prior to the grant of a construction authorization. Section 22.922 of the Commission's rules provides that:

> (a) Notwithstanding any other section of this Part, the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited prior to the grant of a construction authorization. This restriction on transfers of interests in such cellular applications shall include any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans.

3. The Commission further determined that prohibiting the sale, transfer, assignment, or other alienation of any interest in a cellular RSA application, permit or license, until the grant of the construction permit, would deter insincere applicants from speculating in unbuilt and new facilities. In *Fourth Report and Order*,[4] the Commission also strengthened the financial qualification requirements of Section 22.917 in order to reduce further the incentives for applicants to file "sham" or speculative applications.[5]

4. In the Notice, the Commission explained that Section 22.922 has not achieved its goal of eliminating delays in processing. Indeed, Section 22.922 has increased processing time and delays in service by requiring applicants to file waiver requests before legitimate, non-speculative business activities can proceed. The Commission found that these waiver requests place an additional burden on its limited resources, which in turn impedes efforts to expedite the provision of service to the public. This proceeding was initiated to remedy the adverse effects of Section 22.922 by proposing to exclude certain business transactions encompassed by the rule.

5. In the Notice, the Commission proposed to exempt all wireline carriers from the requirements of Section 22.922. The Commission stated that it has experienced no problem of wireline applicants filing speculative applications. The Commission further proposed to exempt non-wireline carriers from the requirements of Section 22.922 when a transfer[6] falls into certain categories of exempted transactions not related to the cellular application filing.

6. These exemptions are: 1) the transfer is necessary to raise capital (including equity or debt placement) to finance a *bona fide* business need of the applicant or an affiliated company not relating to the RSA application or financing thereof; 2) the transfer is part of a *bona fide* sale of an on-going business to which the cellular applications are merely adjunct or incidental; 3) the transfer is required by a court-ordered decree granting a divorce or enforcing a

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[1] Amendment of Section 22.922 of the Commission's Rules to permit limited transfers and assignments of applications in Rural Service Areas, Notice of Proposed Rule Making, 5 FCC Rcd 3265 (1990).

[2] *See* Appendix A for a listing of commenting parties.

[3] In the Matter of Amendment of the Commission's Rules for Rural Cellular Service, Third Report and Order, 4 FCC Rcd 2440 (1988).

[4] In the Matter of Amendment of the Commission's Rules for Rural Cellular Service, Fourth Report and Order, 4 FCC Rcd 2542 (1988).

[5] The *Fourth Report and Order* established rules requiring non-wireline applicants to submit evidence of a firm financial commitment for each cellular market in which they file an RSA application.

[6] "Transfer" is used herein to refer to any sale, assignment, placement of equity or convertible debt, or grant of an option to a third party to purchase the application. As proposed, we adopt the above definition of transfers with minor modifications. No comments were filed concerning this definition. The rule is being modified to make clear that the rule applies not only to a transfer of an application, but also to a transfer of any interest in an application.

spousal separation agreement; 4) the transfer is necessitated by the death of the applicant; 5) the transfer involves the routine trading of shares of a publicly traded corporation which does not constitute a transfer of control of the applicant; 6) the transfer is a *pro forma* transfer of control not involving a change in ownership interests; 7) the transfer involves only the alienation of an interest by an existing partner in a partnership that owns an application to another existing partner in the same partnership or between existing shareholders of a closely held corporation and does not effect a transfer of control of the application; and 8) the transfer involves the alienation or exercise of stock warrants or stock options in the application, which options or warrants existed prior to the filing of the RSA application. The Commission proposed to retain Section 22.922 for all non-wireline alienations of interests which do not fall into one of these categories.

III. DISCUSSION

7. The parties which filed comments in response to the Notice are universal in their agreement that Section 22.922, as it is currently written, is inadequate and needs to be modified. In commenting on the proposal to exempt fully wireline carriers from the requirements of Section 22.922, some parties, such as Telocator, argue that Section 22.922 is overbroad and constrains a wireline carrier's legitimate business activities. USTA adds that wireline carrier transfers tend to be the incidental result of routine business decisions. For its part, Contel states that the purpose of the rule is not served with regard to wireline carriers because they have not created any "trafficking" problems, and the need to apply for a waiver delays service to the public. McCaw, however, does not support a full exemption for wireline carriers, expressing a concern that such an exemption would widen the gap between grant of wireline and non-wireline authorizations. Instead, McCaw supports a liberalization of the rule, but only to the extent that transfers made by wireline applicants be allowed without waiver when they fall into one of the categories proposed to exempt non-wireline carriers from the rule.

8. The commenters do not all agree on the proposed exceptions to Section 22.922 for non-wireline carriers. LIN and Telocator, agreeing with McCaw's position, argue that to subject non-wireline carriers to a set of limited exemptions not equally applicable to wireline carriers would give the wireline carriers a "substantial head-start." Unlike McCaw, however, these commenters do not argue that wireline applicants should be subject to the exemptions, but instead argue that non-wireline applicants should be fully exempt in order to create equitable treatment under the rules. No commenter, however, objects to the non-wireline applicant rule *per se*.

9. Section 22.922 was adopted primarily to prevent transfers which delay processing because they change actual control of the application. When a pending application is assigned or a controlling interest transferred, a new public notice must be issued by the Commission and the application processing cycle is restarted. Section 22.922 was also adopted to prevent speculation in applications.[7] Since the rule was adopted in 1988, we have observed that transfers by wireline carriers have not violated the underlying policy goals. But the effect of Section 22.922 has been to require wireline applicants to file numerous waiver requests in order to complete ordinary business transactions.[8]

10. The record in this proceeding and our experience suggest that the rule may not be required as a protection against application abuse by wireline carriers. However, in the interest of proceeding cautiously, we find it more expedient and equally effective to apply the revised rule for non-wireline carriers to the wireline carriers rather than proceed with wholesale exemption to all wireline carriers. Wireline carriers are able to begin service with a substantial headstart over the non-wireline carriers in that they have a communications infrastructure in place prior to applying for a cellular license. By subjecting wireline cellular applicants to the same exemptions of Section 22.922 we are able to maintain the anti-trafficking protection for those few applications that remain and establish equitable treatment for all carriers, whether wireline or non-wireline.

11. We have found, however, that Section 22.922 has been an effective deterrent to the filing of speculative applications. The proposed non-wireline exemptions cover transactions which occur in the ordinary course of business and, therefore, do not hamper legitimate activities which have only an incidental effect on associated cellular applications. Transactions not encompassed by the exemptions will continue to be prohibited, and waivers will not be routinely granted. Accordingly, speculative applications will still be deterred, while the ordinary business of serious applicants can continue unfettered.

12. BellSouth recommends that we eliminate exemption (1) because it will allow an applicant to file solely for the purpose of winning a lottery and selling its interest in the application to raise capital.[9] According to BellSouth, such a filing would be "speculative," but allowed under exemption (1).

13. It is a common business transaction to sell a company or portion of a company to raise capital in order to run the remainder of the business. In the balance between the possibility of an occasional speculative venture imple-

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[7] Section 22.922 of the Commission's rules was adopted in the *Third Report and Order, supra*. The Commission stated that it was concerned about "the filing of applications by speculators who had no interest in actually constructing and operating a cellular station." 4 FCC Rcd at 2440.

[8] *See, e.g.*, Modoc RSA Limited Partnership, 4 FCC Rcd 3996 (Mobile Serv. Div. 1989) (conducting a corporate merger only incidentally involving the cellular application); Cellular, Inc., 4 FCC Rcd 4495 (Mobile Serv. Div. 1989) (offering debentures to finance outstanding, non-cellular, business needs); Letter from Acting Chief, Mobile Services Division, to R. Jackson, (reference no. 63500-BG, May 18, 1989) (offering noncontrolling amounts of common stock); Letter from Chief, Mobile Services Division, to J. Prendergast (MSD 89-26, Nov. 17, 1989) (acquiring another company to enhance the core business of landline message telephone service); Letter from Chief, Mobile Services Division, to M. Sonn (MSD 89-2, Sept. 26, 1989) (conducting internal capital restructuring).

[9] Exemption (1), as noted in para. 5, *supra*, permits transfers necessary to raise capital (including equity or debt placement) to finance a *bona fide* business need of the applicant, or an affiliated company, not relating to the RSA application or its financing.

mented under the guise of this exemption and the general benefits of reduced regulatory oversight, we believe the latter should prevail.[10] Furthermore, should any issue of a speculative transfer ever arise before us, the cellular applicant will nonetheless be required to demonstrate that the transaction had a business purpose other than one relating to the cellular application. We therefore will adopt exemption (1) as proposed.

14. Moreover, the Commission has in place other safeguards to prevent speculation in the filing of cellular applications. For instance, pursuant to Section 22.40 of the Commission's rules, the Commission will only allow the sale of a cellular permit when there is no speculation or trafficking involved. *See, e.g., Metro Mobile CTS, Inc.*, 7 FCC Rcd 1822 (Mobile Serv. Div. 1992). Additionally, in enacting Section 22.33(b)(2) of the rules, the Commission decided to prohibit nonwireline applicants from entering into partial settlement agreements to discourage the filing of speculative applications. *See Amendment of the Commission's Rules for Rural Cellular Service* (Third Report and Order), 4 FCC Rcd 2440 (1988). The firm financial commitment rules of Section 22.917 also serve to deter speculation. *See, e.g., Eldon L. Hueber*, 6 FCC Rcd 736 (Mobile Serv. Div. 1991) (the Commission's policy in establishing a firm financial commitment standard was to deter applicants that were not capable of financing cellular proposals from submitting applications for speculative purposes). Likewise, the lottery selection procedures of Section 22.923(b)(2) were adopted to streamline the licensing process by reducing the incentive for applicants to file "sham" or speculative applications. *See, e.g., Fred Farley*, 4 FCC Rcd 4670 (Com. Car. Bur. 1989). Accordingly, we believe that the existing rules will continue to adequately protect against the filing of speculative applications after Section 22.922 is amended.[11]

15. BellSouth also proposes a modification to exemption (8) to eliminate the word "exercise" (*see supra*, para. 6.), arguing that the exercise of stock warrants or stock options should not be included. BellSouth asserts that permitting the exercise of stock options would allow third parties who were not owners of the applicant when the application was filed to become owners. This, argues BellSouth, would negate the stated purpose of the proposed rule.

16. Proposed exemption (8) requires that the issuance of stock warrants or options precede submission of the application, which we believe reduces the potential for speculation. In addition, significant stock ownership interests will be revealed in an RSA application pursuant to Section 22.13(a)(1)(iii), and Section 22.921(b) prohibits an applicant, except a publicly traded corporation, from holding any interest in more than one application for a market. We cannot find, therefore, that the potential for speculation by adoption of our proposed rule is sufficient to require the modification suggested by BellSouth. Further, the rule will reduce the need for submission of unnecessary waiver applications. Accordingly, we will adopt exemption (8) as proposed.

17. For its part, Contel seeks clarification of the effect of the proposed non-wireline rule. It states that in *Notice of Proposed Rule Making in Filing and Processing Applications for Unserved Areas*, 5 FCC Rcd 1044 (1990), the Commission proposed not to extend the "wireline set aside" to "fill-in" applications.[12] Contel seeks clarification as to how, without a wireline set aside, the differing provisions for wireline and non-wireline carriers under Section 22.922 would be applied to unserved area applicants in RSAs once the five-year fill-in periods run. In view of our decision to adopt identical provisions for both wireline and non-wireline carriers, the elimination of the wireline set aside will have no effect on wireline or non-wireline carriers with respect to this rule.

IV. CONCLUSION

18. Section 22.922 of the Commission's rules, while primarily promulgated to expedite processing by eliminating applicants' right to file changes in control, instead has served to delay processing by requiring many applicants to file waiver requests in order to accommodate business activities that relate only incidentally to cellular applications. Section 22.922, however, has been beneficial as a barrier to speculation by limiting unrestricted alienation of applications or interests in applications. Based on the comments filed in this proceeding and careful consideration of the issues raised, we find that a uniform rule setting forth specific exemptions applicable equally to wireline and non-wireline carriers would best serve the public interest. Transactions conducted in the ordinary course of business which have no more than an incidental effect on cellular applications should not be impeded. Accordingly, we will adopt the rules proposed in the Notice as amended herein. *See* Appendix B.

V. FINAL REGULATORY ANALYSIS

19. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This Order modifies the rules to prevent unnecessary delays in processing cellular applications. The new rule adopted in this proceeding reflects our increased experience in regulating cellular carriers and furthers our objective of providing excellent service to the public in the most efficient, uncomplicated, timely, and courteous manner possible.

II. The Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

[10] A violation as BellSouth suggests could be the subject of a complaint filed pursuant to Subpart E of Part 1 of the Commission's rules, 47 C.F.R. § 1.701 *et seq.*

[11] We additionally note that we are at the virtual end of the licensing process for the RSAs. The vast majority of the RSAs have already had an applicant be granted a construction permit, thereby making Section 22.922 inapplicable to any transactions by that applicant.

[12] In the First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185 (1991), the Commission adopted the rules for the unserved areas. In this Order, the Commission reaffirmed its earlier decision not to set aside the Block B frequencies for wireline carriers in the unserved areas. *See id.* para. 3 n.5; Rules for Rural Cellular Service (Order on Reconsideration of Second Report and Order), 4 FCC Rcd 5377, 5380 (1990).

III. Significant alternatives considered:

The Notice in this proceeding proposed to exempt wireline cellular applicants from the requirements of Section 22.922. Certain commenters expressed concern that enforcing different regulations upon wireline and non-wireline carriers would harm the non-wireline carriers competitively. Upon review, we determined that the establishment of equal treatment under our rules for all applicants is the most efficient and fair manner to regulate the transfers of cellular applicants.

VI. ORDERING CLAUSES

20. Authority for the rule changes adopted herein is contained in Section 4(i), 4(j), and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 154(i), 154(j), and 303(r).

21. Accordingly, IT IS ORDERED THAT Part 22 of the Commission's rules IS HEREBY AMENDED as discussed herein and as shown in Appendix B.

22. IT IS FURTHER ORDERED THAT the rule changes made herein WILL BECOME EFFECTIVE [30 days after Fed. Reg. publication].

23. IT IS FURTHER ORDERED THAT this proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PARTIES FILING COMMENTS

The Ad Hoc Rural Consortium (ARC)

BellSouth Corporation[13] (BellSouth)

Cellular Communications, Inc. (CCI)

Contel Cellular Inc. (Contel)

LIN Broadcasting Corporation (LIN)

McCaw Cellular Communications, Inc. (McCaw)

Telocator

The United States Telephone Association (USTA)

PARTIES FILING REPLY COMMENTS

Mega Comm, Inc. and W.K. Cellular Inc. (Mega Comm)

The National Telephone Cooperative Association (NTCA)

USTA

[13] The comments of BellSouth were submitted on behalf of BellSouth Corporation, BellSouth Enterprises, Inc., BellSouth Mobility Inc., and American Cellular Communications Corporation.

APPENDIX B

FINAL RULE

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22 PUBLIC MOBILE SERVICE

The authority citation for Part 22 continues to read as follows:

AUTHORITY Secs. 4, 303, 48 Stat. 1082, as amended; 47 U.S.C. §§ 154, 303.

Section 22.922 is revised to read as follows:

22.922 Transfers and assignments of applications, permits or licenses in Rural Service Areas.

(a) Notwithstanding any other sections of this Part, the transfer of any interest in or of any cellular wireline or non-wireline application to offer service in Rural Service Areas is prohibited prior to the grant of a construction authorization. The term "transfer" is defined as a sale, assignment, placement of equity or convertible debt, or grant of an option or future share or participation in the application or any interest thereof. The following are exceptions to this rule:

(1) The transfer is necessary to raise capital, including the placement of debt or equity, to finance a *bona fide* business need of the applicant, or an affiliated company, not relating to the RSA application or financing thereof;

(2) The transfer is part of a *bona fide* sale of an on-going business to which the cellular applications are merely adjunct or incidental;

(3) The transfer is required by a court-ordered decree granting a divorce or enforcing a spousal separation agreement;

(4) The transfer is necessitated by the death of the applicant;

(5) The transfer involves the routine trading of shares of a publicly traded corporation which does not constitute a transfer of control of the applicant;

(6) The transfer is a *pro forma* transfer of control from an applicant not involving a change in ownership interests;

(7) The transfer involves only the alienation of an interest by an existing partner in a partnership which owns an application to another existing partner in the same partnership or between existing shareholders in a closely-held corporation and does not effect a transfer of control of the application; or

(8) The transfer is the result of the alienation or exercise of stock warrants or stock options which existed prior to the filing of the RSA application.

(b) [RESERVED]

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SUPERIOR BROADCASTING CORPORATION — File No. 59497-CM-R-91

For renewal of Station WHT633 in the Multichannel Multipoint Distribution Service in Cincinnati, Ohio, and request for Special Temporary Authority

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 1992; Released: November 17, 1992

By the Chief, Domestic Radio Branch:

1. Before us is an application for renewal of Station WHT633 licensed to Superior Broadcasting Corporation (Superior). In connection with this application, Superior requests a waiver of Sections 21.11(c) and 21.44 of the Commission's rules[1] because the renewal application is late-filed. Since Superior has incurred the automatic forfeiture provision of Section 21.44, it also requests special temporary authority to continue operating (Section 21.25 of the Commission's rules).

BACKGROUND

2. Superior received a conditional license for Station WHT633 on November 19, 1986. It timely filed a certification of completion of construction on May 12, 1989 after two modification applications. Superior then filed an assignment application to assign its license to Patrick M. Thompson which was granted on January 1, 1991. The assignment application has not been consummated pending a decision on the captioned renewal application. Superior's license for WHT633 carried an expiration date of May 1, 1991. Accordingly, in order to comply with Section 21.11 of the rules, Superior's renewal application should have been filed between March 2 and April 1, 1991. Instead, Superior filed its application for renewal on June 5, 1991. In addition to its renewal application, Superior filed a Form 494 for its captioned station to be reinstated, as an alternative to its waiver request and renewal application.

DISCUSSION

3. Superior's authorization expired automatically, without further action by the Commission, on May 1, 1991. 47 C.F.R. §21.44. Section 21.44 of the Commission's rules also permits an applicant to file a petition for reinstatement of a forfeited authorization within thirty days of the expiration of the license, but Superior did not meet this deadline. In support of its waiver request for the deadline, Superior states that it submitted its renewal application "only three days after expiration of the 30-day period" specified in §21.44(b). Superior argues good cause exists to grant its waiver requests and accept its renewal application because Superior has constructed its system, filed all other required reports, spent eight years and substantial capital expenditures in developing its system, and because uninterrupted service should be provided to the Cincinnati area. Superior also states that it has taken steps to avoid repetition of any late filings by establishing a notice procedure among company officials and counsel.

4. Superior's showing is not sufficient to justify a waiver of Sections 21.11 and 21.44 of the rules. A waiver may be granted pursuant to Section 21.19 upon a showing either that the underlying purpose of the rule will not be served, or, that the unique facts and circumstances of a particular case render application of the rule inequitable or unduly burdensome, and that there is lack of a reasonable alternative. Superior has made neither of these showings. First, a purpose of the rule is to ensure that parties will have a date certain after which they may file applications for an area covered by an expired license. Superior's late filing even of its reinstatement petition makes certainty impossible. Second, the rule ensures uninterrupted, authorized service to the public. Licensees failing to file a timely renewal application are providing unauthorized communications services. Finally, Superior has not argued that unique facts and circumstances existed to cause its late filing. Moreover, there is an alternative to grant of its waiver requests which Superior has already anticipated: filing a new Form 494 to reapply for its service area. This application is pending and will be processed in due course.

5. Because service is being provided to the public, we will grant Superior's request for special temporary operating authority for a period of six months or until its reinstatement application is processed, whichever comes first.

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[1] Section 21.11(c) states that the licensee must file its renewal application between thirty and sixty days prior to the expiration date of the license. Section 21.44 states that a license shall be automatically forfeited upon the expiration of the license period, but that the license may be reinstated "if the Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience and necessity." Moreover, this section provides that

> . . . Petitions for reinstatement filed pursuant to this subsection will be considered only if:
>
> (1) The petition is filed within 30 days of the expiration date . . .
>
> (2) The petition explains the failure to timely file such...application as would have prevented automatic forfeiture; and
>
> (3) The petition sets forth with specificity the procedures which have been established to insure timely filings in the future.

ORDERING CLAUSES

6. WHEREFORE, for the foregoing reasons, IT IS HEREBY ORDERED that the petition for waiver and the renewal application filed by Superior Broadcasting Corporation ARE DENIED;

7. IT IS FURTHER ORDERED that special temporary operating authority is granted for a period of six months from the date of release of this order. The authority granted herein is subject to Superior's filing an FCC Form 494A, Certification of Completion of Construction, within thirty days of the release date of this order. Failure to timely provide this information may result in cancellation of the temporary authority.

FEDERAL COMMUNICATIONS COMMISSION

Robert James
Chief, Domestic Radio Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Microwave Video Services, Inc. — File Nos. 8960-CM-P-83 and 8974-CM-P-83

For Authority to Construct and Operate Multichannel Multipoint Distribution Service stations on the E-group channels at Harrisburg, Pennsylvania and Kalamazoo, Michigan

ORDER ON RECONSIDERATION

Adopted: November 5, 1992; Released: November 18, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* After the dismissal by the Domestic Facilities Division (Division) on delegated authority of its applications for authority to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E-group channels at Harrisburg, Pennsylvania and Kalamazoo, Michigan, Microwave Video Services, Inc. (Microwave) requested reinstatement of its applications.

2. *Background.* As the result of Commission lotteries, the above-referenced applications were selected for qualification review. Subsequently, Division staff initiated qualification review of these applications, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the applications were found to contain several deficiencies that precluded the staff from making a finding that Microwave was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its applications would serve the public interest. Microwave was notified by separate letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of each letter.[1] In the deficiency letters, Microwave was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Microwave provided none of the information necessary to complete processing of its application. Pursuant to Secs. 21.13(c), 21.20(d) and 21.28(d) of the Rules, the Division dismissed by letter Microwave's applications for failure to comply in a timely manner with the Division's requests for information. Although acknowledging that it had failed to submit the requested information, Microwave, on reconsideration, asks that its applications be reinstated because: (1) partial responses to the deficiency letters were mailed about a week after the dismissal; (2) resources of the applicant were devoted to petitions to deny; (3) it was assumed that the Division would grant liberally extensions of time to respond to deficiency letters; and (4) after the recent discovery of the loss of availability of the proposed site, Microwave initiated negotiations for leases for new sites.

4. *Discussion.* As of the date of the Division's dismissal actions, Microwave still had not submitted any of the requested information, all necessary for evaluation of its qualifications to be an MMDS licensee. For example, Microwave had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Section 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[3]

5. In addition, Microwave failed to submit the requested current financial qualification data prior to dismissal.[4] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Microwave failed to submit the information necessary for compliance with FCC and FAA regulations concerning avoidance of air navigation hazards, as required by Section 21.15(d) and 17.4(f). *See also* 47 C.F.R. Sec. 21.15(c). Also, Microwave failed to comply with the request to submit the Section 21.902(i) ITFS interference analyses. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS

[1] The deficiencies cited in each letter were the absence of: (1) a public interest statement, pursuant to 21.13(a)(4); (2) a lease or option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (3) correct antenna structure height information for Federal Aviation Administration (FAA) air navigation hazard program compliance, as required by 47 C.F.R. Secs. 17.4(f) and 21.15(d); (4) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (5) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (6) the required tariff exhibit, pursuant to Item 29 of FCC Form 435 and 47 C.F.R. Sec. 21.13(a); (7) required information on station maintenance and emergency repairs, pursuant to 47 C.F.R. Sec. 21.15(e) and FCC Form 435 item 18; (8) answers to each of the questions on pages 5, 6 and 7 of the application, FCC Form 435; (9) the interference analysis required by 47 C.F.R. Sec. 21.901(d)(7); and (10) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Microwave was not required to comply with the requirements of Section 21.15(a), it was required pursuant to 47 C.F.R. Sec. 21.13(c) to submit a lease or option agreement after the Division directed it to do so. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.)*

[4] Even if Microwave were not required to comply with the requirements of Section 21.17, Microwave was required pursuant to Section 21.13(c) to submit it after the Division directed it to do so.

stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that these analyses be submitted by a specified date, Microwave failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

6. Microwave had a duty to submit curative amendments to its applications within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for almost 14 months (Harrisburg) and more than 11 months (Kalamazoo) substantially impeded the expeditious offering of MMDS at Kalamazoo and Harrisburg. Also, Microwave's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissals, Microwave had not provided all of the requested information. The Division was not in a position, therefore, to complete evaluation of Microwave's MMDS station proposals and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion and Ordering Clause.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of these applications for failure to comply with the Division's requests for information was proper and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the requests for reinstatement filed by Microwave Video Services, Inc. regarding the above-referenced MMDS applications ARE DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Great
Scott Broadcasting,

Licensee of Radio Station
WMBO, Auburn, NY

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1992; Released: November 18, 1992

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $5,000 Notice of Apparent Liability (NAL) issued September 24, 1992,[1] to Great Scott Broadcasting, licensee of Station WMBO(AM), Auburn, NY, and (2) the licensee's response to the NAL dated October 22, 1992, asking that the forfeiture be reduced.

2. The NAL was issued for willful and repeated violations of two Commission rules. One requires that any taped, filmed or recorded program material "by which an affirmative attempt is made to create the impression that it is occurring simultaneously with the broadcast, shall be announced at the beginning as taped, filmed or recorded." 47 C.F.R. § 73.1208(a). The other requires that, during all periods of broadcast operation, at least one person holding a commercial radio operator license or permit be on duty in charge of the broadcast transmitter. 47 C.F.R. § 73.1860(a).

3. The licensee contests our conclusion that its news teasers, broadcast daily five minutes before the pre-recorded newscasts each afternoon from at least November 19, 1991, to mid-March 1992, were misleading so as to create the impression that the news was being presented live. We continue to believe, however, that previewing a pre-recorded newscast with the words, "Here are the stories we're working on for the top of the hour," constitutes an affirmative attempt to create the impression of a live broadcast. In such a situation, Section 73.1208(a) of our rules would require an announcement that the material was, in fact, taped. No such announcement was broadcast. The licensee apparently misunderstands this rule in arguing that it presents taped newscasts as a service to the community at times when it cannot afford[2] to present them live. We do not fault the licensee for presenting taped newscasts. The rule simply requires that when material is taped, the public should not be misled into thinking otherwise.

4. Although the licensee does not contest the violations caused by its failure to have a licensed operator on duty pursuant to Section 73.1860(a) of our rules, it asks that we consider, with respect to both rule violations, that the complainant in this case was a prison inmate. We see no reason to disregard valid information concerning violations, or to consider the violations less serious, because of the source of the complaint.

5. Accordingly, we deny the licensee's request for a reduced forfeiture. Pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Great Scott Broadcasting, licensee of Radio Station WMBO(AM), Auburn, NY, FORFEIT to the United States the sum of five thousand dollars ($5,000) for willful and repeated violations of 47 C.F.R. §§ 73.1208(a) and 73.1860(a). Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] *See Great Scott Broadcasting*, 7 FCC Rcd 6260 (MMB 1992).

[2] To the extent that the licensee's petition raises financial hardship as a factor toward reducing the forfeiture amount, we note that it has not submitted a profit and loss statement (see paragraph 1(B) of the Attachment to the NAL) as necessary to support a claimed inability to pay.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Media
Partners, L.P.
Licensee of Station KRYS-FM
Corpus Christi, TX 78408

Petition for Reconsideration
of a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1992; Released: November 18, 1992

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration a Petition for Reconsideration seeking rescission, or, in the alternative, reduction of a $6,250 forfeiture issued July 29, 1992, by the Chief of the Mass Media Bureau, pursuant to delegated authority. That Order found Media Partners L.P., in violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules.[1]

2. The forfeiture order found that the licensee of Station KRYS-FM aired a broadcast that promoted a lottery. The scheme at issue provided that individuals who received a red star on their Shipley Donut receipts could instantly win paraphernalia, such as, coffee mugs, book covers, pencils, pens, caps, neon T-shirts or satin jackets. We determined and you agreed, that chance and prize were present. We also found consideration to be present because insufficient information was provided in the promotional announcements broadcast by KRYS-FM on how individuals could participate without making a purchase. Therefore, we concluded that the promotion was a lottery.

3. In your Petition for Reconsideration, you request a rescission of the forfeiture order, or, in the alternative, a reduction of the forfeiture amount. You disagree that the promotion was a lottery because, you contend, consideration was absent from the scheme, as no purchase was necessary to participate. Regardless of whether receipts are normally given after a purchase, you argue that the receipts were available without purchase and, consequently, no lottery existed.

4. Additionally, you criticize our reliance on the *Public Notice Concerning Applicability of Lottery Statute to Contests and Sales Promotions*, ("*Public Notice*") 18 FCC 2d 52 (1969) and *Taft Broadcasting Co.*, 18 FCC 2d 186 (1969) ("*Taft*"). You state that the *Public Notice* and the *Taft* case discuss situations in which free chances were not equally available to both purchasers and non-purchasers alike or in which non-purchasers were otherwise disadvantaged. You argue that neither situation was present in this instance.

5. Absent an outright rescission of the forfeiture, you urge the Commission to reduce the forfeiture amount because you believe it is excessive. You state that the licensee did not intentionally violate the rule and that the promotion was not for a *de facto* lottery, even if the Commission concludes that it was a *de jure* lottery. Furthermore, you argue that the occurrence of the violation did not significantly adversely impact on the public interest and that the amount is unfair as it is three times the amount imposed on the television station in *Taft*.

6. Your argument that the scheme did not contain consideration because no purchase was necessary was addressed in the Notice of Apparent Liability. There, the Bureau explained that the Commission has stated that when a licensee relies on equal availability between purchasers and nonpurchasers to eliminate the element of consideration, merely stating "no purchase necessary" or "nothing to buy" does not adequately communicate this message. *Public Notice*, 18 FCC 2d 52, 53 (1969). As you are aware, the availability of chances must be real and the actual number of chances given to nonpurchasers must be approximately equal to those chances given to purchasers. While you contend this to be true in the subject scheme, you ignore the other aspect of the equation - that the *Public Notice*, 18 FCC 2d 52, 53 (1969), requires that announcements promoting such schemes provide detailed information such as, the locations, times and manner in which the free chances can be obtained. Otherwise, non-purchasers will be at a disadvantage *vis a vis* purchasers and true equal availability will not be present.[2] Because none of your advertisements promoting the scheme informed nonpurchasers how, when and where they could participate and obtain free chances, the licensee cannot legitimately claim that there was equal availability between purchasers and nonpurchasers. Accordingly, consideration was present and the announcements described promotions that were lotteries.

7. Additionally, we have reviewed the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and conclude that the amount of forfeiture assessed against Corpus Christi Media Partners in this proceeding is justified. We disagree that the amount should be the same amount assessed against the licensee in *Taft*. That case was decided twenty-three years ago, long before changes in the forfeiture law and prior to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). We therefore deny your request to reduce the forfeiture amount.

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[1] The forfeiture order stated that we had not received a response to the Notice of Apparent Liability. However, the licensee informed us that it had timely filed a response with the Secretary's Office. The licensee sent us a copy of the filing on July 29, 1992, asking that it be considered as a petition for reconsideration. Accordingly, as requested, we will treat the filing as a petition for reconsideration of the forfeiture order.

[2] Additionally, you do not dispute that, for the first several days of the contest, announcements did not even state "no purchase necessary."

8. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration of the Memorandum Opinion and Order, filed July 28, 1992, by Corpus Christi Media Partners L.P., licensee of Radio Station KRYS-FM, Corpus Christi, Texas, IS DENIED.

9. IT IS FURTHER ORDERED THAT CORPUS CHRISTI, licensee of Station KRYS-FM, Corpus Christi, Texas SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of six thousand two hundred and fifty dollars for violating the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

DASAN COMMUNICATIONS CORP. File No. BPH-890720MF

WOODBURY COMMUNITY RADIO, INC. File No. BPH-890720MH

For Construction Permit
for a New FM Station on Channel 285A
in Woodbury, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 1992; Released: November 18, 1992

By the Commission:

1. The Commission has under consideration two applications for review filed on February 18, 1992 by Woodbury Community Radio, Inc. ("WCR"), an applicant for a construction permit for a new commercial FM station in Woodbury, Tennessee. Oppositions were filed by mutually exclusive applicant DaSan Communications Corporation ("DaSan"), and WCR replied. WCR requests review of the actions of the Chief, Audio Services Division, Mass Media Bureau ("Bureau"), denying reconsideration of (1) the return of WCR's application as inadvertently accepted for tender, and (2) the grant of the mutually exclusive application of DaSan.[1] We deny the applications for review for the reasons set forth below.

BACKGROUND

2. On July 20, 1989, the mutually exclusive WCR and DaSan applications were filed. However, staff review of the WCR application revealed that Section II, Page 4 (Page 5 of Form 301), which deals with an applicant's legal qualifications including citizenship and other statutory requirements, and Section VII, Page 2 (Page 24 of Form 301), the final certification page, were missing. By omitting Section II, Page 4, WCR did not certify as to whether it was "in violation of the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of [and/or financial assistance provided by] aliens and foreign governments." Also, by omitting a signed certification page (Section VII, Page 24), the applicant did not certify that all statements made in the application "[were] true, complete and correct to the best of [its] knowledge and belief, and [were] made in good faith." Therefore, on June 21, 1991, the Chief, Audio Services Division, acting by (delegated authority, returned the WCR application as inadvertently accepted for tender. On the same date, the mutually exclusive application of DaSan was granted. Subsequently, by letter dated January 3, 1992, the Chief, Audio Services Division, denied WCR's petitions for reconsideration of the return of its application and the grant of the DaSan application.

3. In its application for review, WCR argues that the action taken by the Bureau in returning the WCR application as inadvertently accepted for tender is in conflict with the facts and case precedent as well as Commission policy. WCR reiterates arguments first advanced in its petition for reconsideration that its application should not have been returned as untenderable because: (1) the staff could have determined confidently and reliably, drawing on the application as a whole, that WCR's application complied with Section 310 of the Act; and (2) WCR's site availability certification supplied information "functionally equivalent" to that sought by the missing final certification. We disagree.

DISCUSSION

4. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, published May 13, 1985 ("*Report and Order*")[2] the Commission, seeking to deter the filing of carelessly prepared, unprocessable applications, adopted a "hard look" approach to processing commercial FM broadcast applications. Under this approach, applications which are not substantially complete at tender are to be returned to the applicant, thereby losing their filing status. *Id.*, para. 23. The criteria for determining "substantial completeness" are set forth in the *Report and Order* at Appendix D. Therein, we identified compliance with 47 U.S.C. § 310 (b) as an element which is critically important to the processability of the application. We explained:

> [2.a.] *Compliance with 47 U.S.C. § 310(b).* An application which violates the alien-interest provisions of the Communications Act is statutorily ungrantable. *Failure to respond to the question by which certification of compliance is invited renders the application so fundamentally defective that further processing is unwarranted.*
>
> * * *
>
> If any of the above information is missing, the application will be returned as not sufficient for tender . . . .

[1] The WCR application for review directed to the grant of the DaSan application merely incorporates by reference the allegations in its application for review directed to the return of its own application.

[2] *Recon. denied*, 50 Fed. Reg. 43157 (October 25, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987). The *Report and Order* was reprinted at 58 RR 2d 776 (1985). *See also Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) (affirming Commission application of "hard look" processing standards). The Commission recently modified the "hard look" processing rules, and made these revised rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074 (1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt.

* * *

> *If any of the defects listed above are overlooked during the initial review and are later found in the process, the application will be F returned as inadvertently accepted for tender . . . .*

Id., Appendix D (emphases added).

5. WCR concedes that, as of the close of the application filing window on July 20, 1989, its application did not contain Section II, Page 4, and thus was missing the alien-interest certifications called for by Items 9(a) and (b). Nevertheless, WCR asserts that the listing of its principals and identification of them as U.S. citizens in Section II, Item 4 of the application was sufficient to demonstrate compliance with § 310(b). We disagree. First, in Appendix D to the *Report and Order*, we expressly stated:

> *If any of the above information is missing, the application will be returned as not sufficient for tender.* If any of the above information *is present* but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, . . . the defective application will be deemed not sufficient for tender.

50 Fed. Reg. at 19,946 (emphases supplied). Thus, in Appendix D, the Commission specifically limited the policy of examining the four corners of an application to incorrect or inconsistent information. *Sumter Radio Partnership*, 7 FCC Rcd 5539, 5540(1992); *Radio Lompoc L.P.*, 7 FCC Rcd 3798, 3799 (1992); *Star Signal Corp.*, 1 FCC Rcd 450, 451 (1986). Because, as WCR concedes, its application omitted the required alien-interest certifications, we find that WCR's application was properly returned as untenderable.[3]

6. Moreover, the WCR application was unsigned (on page 24 of FCC Form 301) and therefore lacked the required certification that the statements made within it were "true, complete and correct to the best of [its] knowledge and belief, and [were] made in good faith." As the Commission has stated, "[b]ecause of the critical importance of the applicant's certification of the correctness of the data contained in the application as of the date of filing, unsigned applications will not be accepted for tender." *Report and Order*, Appendix D, 50 Fed. Reg. at 19946; *see Mary Ann Salvatoriello*, 6 FCC Rcd 4705, 4706 (1991). One exception should be noted. In *Salvatoriello* we agreed with the Bureau's view that the EEO portion of Form 301 provides for a certification sufficiently similar to that called for on page 24 that they could be perceived by an applicant as functionally equivalent.[4] Given this potential confusion, the Commission concluded that, where an applicant signs and certifies to the EEO portion, but does not sign page 24 of the application, the application will be deemed substantially complete and tenderable. 6 FCC Rcd at 4707 (citing *Cielo Communications*, 3 FCC Rcd 6752 (MM Bur. 1988)). *See also Rio Grande Broadcasting Co.*, 6 FCC Rcd 5519, 5520 (Rev. Bd. 1991). By contrast, in this case WCR did not propose a model EEO program and, thus, did not complete the model EEO certification. Although the signature of one of WCR's principals does appear in Section VII, Page 23 of the application, that section is not preceded by functionally equivalent language, but calls only for more limited certifications as to whether the applicant has reasonable assurance of the availability of its transmitter site and has given public notice of the filing of its application. Therefore, the WCR application lacked a certification as to the accuracy of the data provided. Accordingly, for this second, independent reason, the application was properly returned as untenderable. *See Taber Broadcasting Company of New Mexico*, 4 FCC Rcd 7892 (1989); *cf. Mary Ann Salvatoriello* (facsimile signatures are tenderability defects).[5]

7. ACCORDINGLY, IT IS ORDERED, That the applications for review filed on February 18, 1992 by Woodbury Community Radio, Inc. ARE DENIED.

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[3] We also reject as patently without merit WRC's claim that the Bureau is "estopped" from returning its application as "inadvertently accepted" for tender because the public notice of tender of WRC's application referred to a motion to dismiss which DaSan had filed against that application. WCR states that the DaSan motion addressed the deficiencies at issue and surmises that the Bureau must have found the WCR application acceptable for tender despite the deficiencies. WCR's surmise is wrong. The contents of a motion to dismiss are not reviewed by the FM legal staff until after an application is accepted for tender. Tenderability defects discovered by the legal staff will lead to the dismissal of the application. *See* 47 C.F.R. § 73.3564(b) (preliminary acceptance "will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the FCC's rules").

[4] Specifically, the Model EEO certification provides, "I certify that the statements made herein are true, complete, and correct to the best of my knowledge and belief, and are made in good faith."

[5] Finally, we have reviewed the cases that WCR cites in support of its claim that the "inadvertent omission" of the pages inviting certification should not be cause for the dismissal of its application. All are readily distinguishable. Most of these cases, which permitted a missing signature or other defects to be cured by amendment, were decided prior to the effective date of the "hard look" *Report and Order* and therefore are inapposite. *E.g., Berwick v. FCC*, 286 F.2d 97 (D.C.Cir. 1960); *Gareth F. Garlund*, 68 FCC 2d 1382, 1383 (1978); *Baker-Smith Communications Co.*, 67 FCC 2d 548, 551-52 (1978); *Henry M. Lesher*, 67 FCC 2d 278 (1977) (application not substantially complete because several sections were incomplete); *Communication Gaithersburg, Inc.*, 60 FCC 2d 537, 541-42 (1976); *Central Florida Enterprises, Inc.*, 22 FCC 2d 260, 263-64 (1970); *Finer Living, Inc.*, 5 FCC 2d 984, 987 (1966); *Jane A. Roberts*, 29 FCC 141, 150 (1960); *Johnston Broadcasting Co.*, 14 FCC 472, 474-76 (1950). Similarly inapposite are *CityLight Communications, Inc.*, 4 FCC Rcd 1676 (MM Bur. 1989) and *Thaddeus Bishop*, 2 FCC 2d 2104, 2105 (MM Bur. 1987), television cases to which the FM "hard look" policy does not apply.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Classification of Enhanced Services for Accounting Purposes — AAD 91-25

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 1992; Released: November 18, 1992

By the Commission:

1. In *RAO Letter 16*,[1] the Accounting and Audits Division of the Common Carrier Bureau required that all carriers subject to the Commission's cost allocations rules continue classifying their enhanced services operations as nonregulated activities for federal accounting purposes on an interim basis, pending Commission action on remand of *California v. FCC*.[2] Applications for review of *RAO Letter 16* were filed by the People of the State of California and the Public Utilities Commission of the State of California (collectively, "California")[3] and by the Public Service Commission of the District of Columbia ("DC PSC").[4] Bell Atlantic submitted an opposition to California's application.[5]

2. In its application for review, California contends that *RAO Letter 16* frustrates the exercise of state authority over intrastate telecommunications services. California therefore argues that the Communications Act of 1934 and judicial precedent mandate that we rescind *RAO Letter 16* and apply jurisdictional separations procedures to enhanced service costs. The DC PSC contends that the Commission's rules require enhanced services to be classified as regulated because they have not been preemptively deregulated. Bell Atlantic opposes rescission of *RAO Letter 16*, pointing out that the letter simply preserved the *status quo* in order to avoid disruption during the proceedings on remand following *California v. FCC*.

3. California's arguments are similar to those California raised in response to our proposal in the *Notice of Proposed Rule Making and Order* in CC Docket No. 90-623 to continue the nonregulated treatment of enhanced services for accounting and cost allocation purposes.[6] We considered California's arguments as well as other arguments raised in that proceeding in our deliberations on the permanent classification.[7] After considering those arguments, we continued the nonregulated classification on a permanent basis for federal accounting and cost allocation purposes. We determined that continuation of that classification will not preempt or infringe upon state regulatory authority. Moreover, we found that the difficulty, complexity, and expense that would arise should enhanced services be classified as regulated and subjected to jurisdictional separations is neither necessary nor warranted.[8] These determinations apply with equal or greater force to our choice of an interim accounting classification.

4. The argument of the DC PSC is likewise unpersuasive. As the DC PSC recognizes, our rules require that activities that have not been preemptively deregulated must be classified as regulated activities "unless the Commission decides otherwise."[9] The Common Carrier Bureau, acting on delegated authority, appropriately determined that enhanced services should continue to be treated as nonregulated activities pending a decision as to a permanent accounting classification.[10] We have, subsequently, decided that enhanced services should be classified as nonregulated on a permanent basis. The DC PSC's argument is therefore inapposite to a decision on this issue.

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 1.115 of our rules, 47 C.F.R. §1.115, that the applications for review filed by the People of the State of California and the Public Utilities Commission of the State of California and by the Public Service Commission of the District of Columbia ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] Responsible Accounting Officers Letter 16, Classification of Enhanced Services for Federal Accounting Purposes, 5 FCC Rcd 5947 (Com. Car. Bureau 1990) (*RAO Letter 16*).

[2] California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[3] "Application for Review of RAO Letter 16" (filed November 16, 1990).

[4] "Application for Review of RAO Letter 16" (filed November 19, 1990).

[5] "Opposition of Bell Atlantic to Application for Review" (filed November 30, 1990).

[6] Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 174 (1990) (*Computer III Remand Proceedings*).

[7] *See Computer III Remand Proceedings*, 6 FCC Rcd 7571, 7578-81, ¶ ¶15-20 (1991).

[8] *Id.* at 7580-81.

[9] 47 C.F.R. §32.23(a). *See* DC PSC comments at 2.

[10] *RAO Letter 16*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Application for Review
of McKinnon Broadcasting Company

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1992; Released: November 19, 1992

By the Commission:

1. The Commission has before it an Application for Review filed by McKinnon Broadcasting Company ("McKinnon"), licensee of UHF station KUSI-TV in San Diego, California, seeking review of the Mass Media Bureau's ("Bureau") denial of a Petition for Rule Making. In its Petition, McKinnon had requested a rule making that would effectively extend the restrictions of Section 325(b) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 325(b), to further limit network affiliations with foreign stations that broadcast programming into the United States. Under Section 325(b), any entity seeking to electronically transmit programming to a foreign station for the purpose of having that programming broadcast to the U.S. must apply for and obtain an FCC permit. An entity delivering programming via non-electronic means, however, is not required to apply to the Commission for Section 325(b) authority. McKinnon's proposal would impose requirements similar to those of Section 325(b) on U.S. networks that delivered programs non-electronically. The Bureau denied McKinnon's Petition pursuant to the terms of Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e). For the reasons set forth below, McKinnon's Application for Review is denied.

2. In its Application for Review, McKinnon argues that the Bureau denial erroneously prevented notice and comment on its rulemaking proposal. McKinnon ultimately seeks to prohibit any national television network from affiliating with a foreign station without prior Commission approval, unless the network has already offered the affiliation to a domestic station that can provide comparable service. According to McKinnon, its request was prompted by a situation that exists in the San Diego, California market, in which Fox Broadcasting Company ("Fox") has affiliated with Mexican station XETV, despite McKinnon's attempts to acquire the affiliation for its San Diego, UHF station KUSI-TV. McKinnon claims that Fox programming is sent to XETV by physically delivering (or "bicycling") tapes across the border, thereby circumventing the need to file an application with the Commission for authority to transmit programming to a foreign station pursuant to Section 325(b).

3. After careful review of the record before us, we conclude that the Bureau properly denied the McKinnon proposal and that the matter should not be considered further.[1] McKinnon's underlying request is, in effect, an effort to expand the restrictions of Section 325(b) to limit network affiliations with foreign stations in cases involving physical delivery of programming. The Commission, however, has previously considered the regulation of "bicycling" both under Section 325(b) and its general powers, and it has refused to extend governmental supervision over this activity. Specifically, we have concluded that FCC jurisdiction under Section 325(b) appears to be limited to the regulation of cases involving the electronic transmission of programming, and that regulation under our general powers is unwarranted. *See Pre-released TV Programming*, 75 FCC 2d 304, 329-30 (1979); *see also Media Productions*, 48 RR 2d 160, 161 (1980); *Delivery of Broadcast Matter to Foreign Stations*, 46 RR 2d 1688, 1689 (1980); *Baker v. United States*, 93 F.2d 332 (1937), *cert. denied*, 303 U.S. 642 (1938). We have also indicated that any attempt on our part to expand our jurisdiction in this area would raise First Amendment questions, especially where there is no compelling public interest need for the restriction. *See Media Productions*, 48 RR 2d at 161.[2] As discussed below, McKinnon has failed to set forth any convincing evidence or reason that would call into question our longstanding refusal to regulate the transport of taped programs across U.S. borders.

4. McKinnon asks that we reassess our previous determination that regulation of bicycling is unwarranted, citing two public interest reasons for instituting such regulation.

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[1] Section 553(e) of the APA gives parties the right to petition for rule making, but does not require notice and comment on such petitions. *See* 5 U.S.C. § 553(e). Moreover, the legislative history of the APA indicates that Congress did not intend to require notice and comment on all petitions. *See* Report of the Senate Subcommittee on the Judiciary on the Administrative Procedure Act, Sen. Report No. 758, 79th Cong., 1st Sess., 201 (1945); *see also* House Report No. 1980, 79th Cong., 2d Sess., 260 (1946) (adopting language identical to Senate Report). Contrary to McKinnon's assertion in its Application for Review, denial of a petition for rule making without opportunity for public comment is not an "extraordinary procedure," but rather an appropriate and usual response to a request that can be resolved at an early stage. The Commission and its staff have broad authority under Section 1.401(e) of the Rules to deny petitions for rule making without first obtaining public comment if the petition is moot, repetitive, premature, frivolous or plainly does not warrant consideration by the Commission. Indeed, the Commission expressly amended Section 1.401(e) in 1980 to allow its staff to take such summary action. In so doing, the Commission noted:

> Where initial staff examination indicates that . . . the petition will almost certainly be dismissed or denied, notice and comment on the petition itself is a needlessly burdensome step which imposes unwarranted demands of time and expense on both private parties and Commission staff, with no offsetting contribution to regulatory fairness or efficiency. Nor is notice and comment on rule making petitions required under the APA [Administrative Procedure Act].

Memorandum Opinion and Order, 79 FCC 2d 1, 2 (1980).

[2] McKinnon argues that its proposal would not violate the First Amendment. We decline, however, to address the question of whether restrictions on the physical delivery of programming to foreign stations violate the First Amendment, as we have determined on other grounds that further consideration of the McKinnon proposal is unwarranted. Specifically, we find that public interest would not be advanced by McKinnon's request. *See* discussion *infra*.

First, McKinnon argues that if foreign station affiliations were restricted, networks would be more inclined to affiliate with domestic UHF stations, which would further the Commission's longstanding goal of fostering UHF service. Second, McKinnon asserts that foreign station affiliations should be restricted because foreign broadcast facilities do not have to satisfy the public service obligations that are imposed on domestic licensees.

5. We are not convinced that the public interest would be advanced if we were to take the proposed regulatory action or pursue the matter further. As we stated in *Pre-Released TV Programming*, 75 FCC 2d 304, 332 (1979), "justification for regulatory intervention depends . . . on whether it is realistically needed to safeguard a recognized public interest objective which would demonstrably suffer if we did not act, and which our action could protect in a meaningful way." In that case, we concluded that the pre-release of U.S.-produced programs by Canadian stations serving the U.S. before they are broadcast by American stations affiliated with U.S. networks did not have enough of an impact on American television stations to justify regulation in the public interest. We reach a similar conclusion in this case because we do not think that regulatory intervention is necessary as a safeguard, nor do we think that such action would promote public interest objectives in a meaningful way.

6. There are several reasons why we reach this conclusion. First, the rule as proposed would appear to have such limited application that it could not significantly promote the public interest goals identified. McKinnon has presented only a single example of bicycling programming to a foreign station serving the U.S. Nor do we think such cases are likely to arise in the future. In an increasingly competitive video marketplace, it is unlikely that widespread network bicycling will occur, since this form of program delivery is generally less efficient than electronic means of delivery. In view of the limited application of McKinnon's proposal, we believe that any possible benefit of the proposal would be outweighed by the costs of instituting such regulation.[3]

7. Second, we are also not convinced that domestic viewer service would benefit from regulation of bicycled programming. For instance, McKinnon suggests that restrictions on foreign station affiliations are warranted because these facilities are not required to satisfy the public interest obligations imposed on domestic stations. The proposed rule, however, would not alter the fact that Americans living in border communities receive programming from foreign stations not subject to U.S. obligations, which would be the case regardless of the source of the programming. Moreover, we are not prepared to infer that, absent McKinnon's proposed rule, unaffiliated domestic stations cannot fully meet their obligations to provide service in the public interest.

8. Finally, McKinnon has presented no evidence that the practice of bicycling tapes to foreign border stations, when it does occur, poses any competitive danger to the UHF service. The inefficiency of bicycling ordinarily puts stations that participate in this activity at a tremendous programming disadvantage. For example, on-the-spot coverage of events such as sports and news is impossible via bicycling, which would not be the case if the station had its programming delivered electronically. Thus, overall, we do not believe that foreign VHF competitors that receive bicycled programming can pose a significant enough threat to the viability of domestic UHF stations (which can rely on electronic program delivery) to justify the proposed regulation.

9. In conclusion, McKinnon has provided no convincing evidence indicating that a rule making is warranted. Accordingly, IT IS ORDERED that the Application for Review filed by McKinnon Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] The costs of McKinnon's proposal to increase our regulatory oversight of network practices would burden both the industry and the Commission, to the ultimate detriment of the public. For example, such regulation would limit a network's flexibility and opportunities, and inject uncertainty into its business planning. Also, while bicycling cases should not arise often, such regulation will nevertheless impose unnecessary administrative costs on this agency.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-84

In the Matter of

Amendment of Section 73.202(b),	RM-6656
Table of Allotments,	RM-6787
FM Broadcast Stations.	RM-6788
(Leakey, Mason,	
Rocksprings, Texas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 8, 1992; Released: November 19, 1992

By the Chief, Allocations Branch:

1. At the request of Roy E. Henderson, d/b/a Hill Country Communications ("petitioner"),[1] the Commission has before it the *Notice of Proposed Rule Making,* 4 FCC Rcd 3602 (1989) proposing the allotment of Channel 249C2 in lieu of Channel 250C2 at Mason, Texas. Petitioner states that the equivalent channel substitution will allow the relocation of the transmitting facility to an area that is more desirable for its use. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. In response to the *Notice,* Mark Warner ("Warner") filed comments and a counterproposal requesting the allotment of Channel 249A to Leakey, Texas, as the community's first local service, and Rocksprings Broadcasting Service ("Rocksprings") filed comments and a counterproposal requesting the allotment of Channel 249A to Rocksprings, Texas, as that community's first local service. Warner and Rocksprings state that they will apply for the respective channels, if allotted.

2. In reply comments, petitioner suggests that alternate channels be allotted to Leakey and Rocksprings. An engineering analysis shows that Channel 282A can be allotted to Leakey, and that Channel 273A can be allotted to Rocksprings.

3. In an objection against Rocksprings's counterproposal, petitioner argues that Rocksprings's counterproposal was not properly signed and verified pursuant to Section 1.52 of the Commission's Rules. We agree. Rocksprings's pleading was signed by its consulting engineer, but was not signed and verified by a principal of Rocksprings. Section 1.52 requires that a petitioner, unless represented by legal counsel, sign and verify all pleadings submitted to the Commission. A consulting engineer's signature alone does not comply with this section of our rules. Furthermore, we note that Rocksprings made no attempt to cure this defect. Accordingly, we will dismiss Rocksprings's counterproposal. We note, however, that the action taken herein may not preclude allotment of another channel at Rocksprings at a future date.[2]

4. We believe the public interest would be served by allotting Channel 249C2 at Mason, Texas because it will allow petitioner to find a suitable transmitter site. Channel 249C2 can be allotted at Mason at petitioner's requested site 28.2 kilometers (17.5 miles) southeast of Mason.[3] We also believe that the public interest would be served by allotting Channel 282A to Leakey, Texas,[4] without a site restriction, as a first local service to the community. We note that concurrence from the government of Mexico has been received for the allotment of Channel 249C2 at Mason, and for Channel 282A at Leakey, as a 3 kilowatt facility.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Leakey, Texas	282A
Mason, Texas	249C2

6. The window period for filing applications for Channel 282A at Leakey, Texas, will open on **January 5, 1993,** and close on **February 4, 1993.**

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Laser Communications, Inc. for Station KOAX(FM), Channel 250C2, Mason, Texas, IS AMENDED to specify operation on Channel 249C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

[1] On October 14, 1991, the Commission granted an application (File No. 901030GL) for assignment of construction permit for Station KOAX(FM), Mason, Texas, from Roy E. Henderson, d/b/a Hill Country Communications, to Laser Communications, Inc.

[2] As part of its objection, petitioner argues that the failure of Rocksprings to verify the document properly also raises a suspicion that the document was filed as a strike petition. Since petitioner has provided no support whatever for this allegation, we will not explore it further.

[3] Channel 249C2 can be allotted at Mason at coordinates 30-31-00 and 99-07-00.

[4] Channel 282A can be allotted at Leakey at coordinates 29-43-42 and 99-45-48. Since this allotment is the result of a petition for rule making filed prior to October 2, 1989, the Leakey licensee can avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station KZEP(FM), San Antonio, Texas.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of of filing an environmental assessment to Section 1.1307 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the counterproposal filed by Rocksprings Broadcasting Service IS DISMISSED.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order,* to the following:

Laser Communications, Inc.
Suite 4500
Houston, Texas 77002
(successor to petitioner)

John B. Kenkel, Esq.
Kenkel & Associates
1220 19th Street, N.W.
Suite 202
Washington, D.C. 20036
(counsel to Mark Warner)

Steve M. Kramer, P.E. and Associates
10500 Bighorn Trail, Suite 100
McKinney, TX 75070
(consultant to Rocksprings Broadcasting Service)

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-143

In the Matter of

Amendment of Section 73.202(b), RM-8010
Table of Allotments,
FM Broadcast Stations.
(Eagle, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 8, 1992; Released: November 19, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 4391 (1992), issued in response to a petition for rule making filed by Eagle Broadcasting, Inc. ("petitioner"), proposing the substitution of Channel 300C for Channel 300C2 at Eagle, and the modification of its construction permit to specify operation on the higher powered channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 300C for Channel 300C2 at Eagle, Idaho, in order to provide the area with greater reception service. As indicated in the *Notice*, Channel 300C can be allotted to Eagle in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit, without the imposition of a site restriction.[1] As proposed we will modify petitioner's construction permit for Station KRVG(FM) to specify operation on Channel 300C at Eagle, Idaho, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Eagle, Idaho	300C

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station KRVG(FM), Eagle, Idaho, IS MODIFIED, to specify operation on Channel 300C in lieu of Channel 300C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Eagle Broadcasting, Inc., permittee of Station KRVG(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 300C at Eagle are North Latitude 43-45-18 and West Longitude 116-05-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-85

In the Matter of

Amendment of Section 73.202(b), RM-7959
Table of Allotments,
FM Broadcast Stations.
(Hampton and Parkersburg, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 13, 1992; Released: November 19, 1992

By the Chief, Allocations Branch:

1. At the request of John Linder ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 2406 (1992), proposing the reallotment of Channel 255A from Hampton to Parkersburg, Iowa, and the modification of Station KARP's construction permit to specify Parkersburg as its community of license. Petitioner filed comments reiterating his intention to apply for Channel 255A, if allotted to Parkersburg. No other comments were received.

2. We believe the public interest would be served by reallotting Channel 255A from Hampton to Parkersburg, since it could provide the community with its first local aural transmission service. Parkersburg is an incorporated community in Butler County, with a 1990 Census population of 1,804 persons. In addition, neither Parkersburg nor Hampton are located within any Urbanized Area. Further, the deletion of Channel 255A from Hampton will not deprive the community of its sole local aural transmission service since it will retain service from Station KWGG, Channel 285A.

3. Channel 255A can be allotted to Parkersburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.1 kilometers (9.4 miles) west to avoid a short-spacing to the pending applications for Channel 253C3 at Cedar Falls, Iowa.[1] In reviewing the technical aspects of this proposal, the staff found that applications for Channel 253C3 at Cedar Falls had been filed subsequent to the adoption of the *Notice* but prior to its publication in the Federal Register. One of the applications specifies coordinates which conflict with the proposed coordinates for Parkersburg. Petitioner has not indicated that the site chosen in its petition constitutes anything other than a theoretical site chosen for the purpose of showing compliance with the Commission's minimum distance separation requirements. Therefore, in conformance with the Commission's policy of accommodating applications wherever possible, the site restriction set forth herein has been modified from that specified in the *Notice of Proposed Rule Making*. *See Patterson, California*, 7 FCC Rcd 1719 (1992) and *Hardinsburg, Kentucky*, 7 FCC Rcd 1746 (1992). As proposed, we will also modify Station KARP's construction permit to specify Parkersburg has the station's community of license.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Hampton, Iowa	285A
Parkersburg, Iowa	255A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of John Linder for Station KARP, Channel 255A, IS MODIFIED to specify Parkersburg, Iowa, in lieu of Hampton, Iowa, as its community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, John Linder, permittee of Station KARP, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 255A at Parkersburg are North Latitude 42-35-17 and West Longitude 92-58-12.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-248

In the Matter of

Amendment of Section 73.202(b), RM-8105
Table of Allotments,
FM Broadcast Stations.
(Southern Shores, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 13, 1992; Released: November 19, 1992

Comment Date: January 11, 1993
Reply Comment Date: January 26, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Joseph A. Booth ("petitioner") requesting the allotment of Channel 265C2 to Southern Shores, North Carolina, as the community's first local aural transmission service. Petitioner states that Southern Shores is an incorporated community in Dare County, with a 1990 U.S. Census population of 1,447 persons and that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 265C2 to Southern Shores, since an interest has been expressed in providing the community with its first local FM service. Channel 265C2 can be allotted to Southern Shores in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] We recognize that this allotment is short-spaced to the allotment coordinates for Channel 266C2 at Belhaven, North Carolina. However, a construction permit (BPH-861103IG) has been issued to Station WKJA at Belhaven at coordinates which do not conflict with this proposal. Therefore, final action on this proposal may be withheld pending the licensing of Station WKJA at the site specified in its outstanding construction permit.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Southern Shores, . North Carolina	--	265C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 11, 1993,** and reply comments on or before **January 26, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joseph A. Booth
517 Croatan Road
Virginia Beach, Virginia 23451
(Petitioner)

6. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Notice of Proposed Rule Making,* by REGISTERED MAIL, RETURN RECEIPT REQUESTED, to the following: Station WKJA, Spirit Broadcasting, Inc., P.O. Box 3837, Wilson, North Carolina 27893.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] The coordinates for Channel 265C2 at Southern Shores are North Latitude 36-06-30 and West Longitude 75-43-20.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-249

In the Matter of

Amendment of Section 73.202(b), RM-8103
Table of Allotments,
FM Broadcast Stations.
(Proctor, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 13, 1992; Released: November 19, 1992

Comment Date: January 11, 1993
Reply Comment Date: January 26, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Frank P. Befera ("petitioner"), seeking the allotment of Channel 299A to Proctor, Minnesota, as that community's first local service.[1] Petitioner submitted information in support of the proposal and indicated he would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the allotment would provide a first local service to Proctor, Minnesota. We do note that although Proctor is located in the Duluth-Superior urbanized area, it meets our allotment criteria as it is an incorporated community with a population of 2,974 according to the 1990 census. Channel 299A can be allotted to Proctor, Minnesota, consistent with the minimum distance separation requirements of the Commission's Rules without a site restriction.[2] Since Proctor is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Proctor, Minnesota	---	299A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 11, 1993,** and reply comments on or before **January 26, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Robert J. Rini
Rini & Coran, P.C.
1350 Connecticut Ave., N.W., Suite 900
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner requested the allotment of Channel 297A to Proctor but to avoid a short-spacing to a proposal to allot Channel 296C3 to Moose Lake, Minnesota (RM-8075), we have instead proposed Channel 299A.

[2] The coordinates for Channel 299A at Proctor are 46-44-42 and 92-13-54.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-250

In the Matter of

Amendment of Section 73.202(b), RM-8101
Table of Allotments,
FM Broadcast Stations.
(Thibodaux, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 14, 1992; Released: November 19, 1992

Comment Date: January 11, 1993
Reply Comment Date: January 26, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by KXOR, Inc. ("petitioner"), licensee of Station KXOR-FM, Channel 292A, Thibodaux, Louisiana, requesting the substitution of Channel 292C3 for Channel 292A at Thibodaux, and the modification of Station KXOR-FM's license to specify operation on the higher powered channel. Petitioner states it will apply for Channel 292C3, if allotted to Thibodaux.

2. We believe the public interest would be served by proposing the substitution of Channel 292C3 for Channel 292A at Thibodaux, Louisiana, since it could provide the community with a wide area FM service. Channel 292C3 can be allotted to Thibodaux in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.9 kilometers (12.4 miles) southeast to accommodate petitioner's desired site.[1] As requested, we also propose to modify petitioner's license for Station KXOR-FM to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 292C3 at Thibodaux or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Thibodaux, Louisiana	292A	292C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 11, 1993,** and reply comments on or before **January 26, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bradford D. Carey, Esq.
Hardy and Carey
111 Veterans Highway
Suite 255
Metairie, Louisiana 70005
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 292C3 at Thibodaux are North Latitude 29-37-36 and West Longitude 90-45-07.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-265

In the Matter of

Amendment of Section 73.202(b),	RM-7795
Table of Allotments,	RM-7870
FM Broadcast Stations.	
(Ashland and Eagle Point,	
Oregon)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 15, 1992; Released: November 19, 1992

By the Chief, Allocations Branch:

1. At the request of Jeffrey Rochlis ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5330 (1991), proposing the allotment of Channel 298C2 to Ashland, Oregon, as the community's second local commercial FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. Comments in opposition to the allotment were filed by Dalmation Enterprises, Inc. ("Dalmation"), and a counterproposal was filed by Fatima Crusade Educational Radio Foundation ("Fatima Crusade").[2] Reply comments were filed by the petitioner.

2. Dalmation argues that the petitioner's statement of intent to apply for the Ashland channel should not be considered as valid since this request is but one of three petitions for channel allotments at different communities filed by the petitioner on the same day. Dalmation questions whether the petitioner has the financial ability to construct all of the stations.[3] Further, since petitioner is not eligible for a comparative application preference based on gender or race and cannot claim a local ownership credit for all of the requested communities, Dalmation argues that petitioner's statement of intent to apply for the channel should be considered as being conditioned upon the Commission's adoption of petitioner's proposal, advanced in Gen. Docket 90-264, to award a "pioneer's preference" in comparative hearings to those parties who initiate the allotment proceeding.[4] [5]

3. Fatima Crusade requests the allotment of Channel 298C3 to Eagle Point, Oregon, and its reservation for noncommercial educational use. In support of the channel reservation, Fatima Crusade states that there are no channels available within the reserved portion of the FM band due to Eagle Point's location within the Medford, Oregon, Standard Metropolitan Statistical Area. As for the community itself, Fatima Crusade points out that Eagle Point is incorporated and has its own business area.

4. Petitioner opposes the allotment at Eagle Point. It points out that Channels 201-220 are reserved for noncommercial educational use and argues that Fatima Crusade has not presented sufficient evidence to waive the restriction on reserving commercial channels for noncommercial use. According to petitioner, Eagle Point already has one noncommercial educational FM station and a second such station is licensed to Medford, Oregon, only 20 miles distant. Further, petitioner contends that the allotment of a Class C2 channel to Ashland would further the Commission's goal of efficient use of the spectrum since the Ashland allotment would allow 1 mV/m service to an additional 38,709 persons in an area 1,791 square miles larger than would the C3 allotment at Eagle Point. Finally, noting that both communities are already served by local FM stations, petitioner argues that Ashland, with a population of approximately 17,000 persons, is more deserving of the allotment than Eagle Point, with its population of approximately 3,000 persons.

5. Petitioner contends that Dalmation's comments concerning his intention to apply for the channel and the underlying rationale for requesting the allotment are unfounded. He states that parties other than women, minorities and local residents file applications for new FM channels. Further, he argues that Dalmation has not provided any factual basis for claiming that the petition was filed in an effort to garner a "pioneer's preference" for applicants who initiate rule makings to allot a new FM or TV channel. Petitioner attributes the opposition to the fact that Dalmation, as the licensee of Ashland's sole local FM facility, desires to prevent the initiation of a competitive service. Finally, petitioner reiterates his intention to apply for Channel 298C2, if allotted to Ashland.

6. We have reviewed the pleadings before us and find that both Ashland and Eagle Point are deserving of FM allotments. Further, we need not comparatively consider the two proposals since the staff has found that an alternate channel, 292C3, is available for allotment to Eagle Point. We will not, however, reserve the Eagle Point allotment for noncommercial educational use. Commission policy generally does not permit the reservation of a commercial channel for noncommercial educational use except where channels in the reserved portion of the FM band (Channels 201-220) are not available due to TV Channel 6 interference or foreign use of channels in the noncommercial

[1] The community of Eagle Point has been added to the caption.
[2] Public Notice of the counterproposal was given on November 27, 1991, Report No. 1868.
[3] Rochlis also requested allotments for Redmond, Oregon, and Los Alamos, New Mexico. On October 31, 1991, Rochlis withdrew his interest in the Redmond proposal and the proceeding has been terminated. *See* 7 FCC Rcd 3019 (1992). On May 15, 1992, Channel 298C was allotted to Los Alamos. *See* 7 FCC Rcd 3249 (1992). Three applications for the Los Alamos allotment have been received, including one filed by petitioner.
[4] *See Reexamination of the Policy Statement on Comparative Broadcast Hearings* (GC Docket No. 92-52), 7 FCC Rcd 2664 (1992).
[5] Dalmation also argues against what it characterizes as the Commission's policy of allotting channels on demand, noting the economic harm caused to existing stations from such a policy. However, these arguments are not appropriate for consideration in this proceeding. The Commission abolished its consideration of such *Carroll* doctrine issues, stating that it had determined that additional competition to existing broadcast stations by new full service stations is beneficial to the public. *See* 3 FCC Rcd 638 (1988).

educational band. Fatima Crusade has not shown that either of these situations exist with respect to an educational allotment at Eagle Point. However, since an alternate channel can be allotted without prejudice to any other pending proposal, we will allot Channel 292C3 to Eagle Point. Fatima Crusade may seek authority to operate the station as a noncommercial educational facility.

7. We also believe the public interest would be served by allotting Channel 298C2 to Ashland, Oregon, as the community's second local commercial FM channel. Petitioner has reiterated his intention to apply for the channel and Dalmation has not provided information which would lead us to question petitioner's commitment. In this regard, we note that petitioner filed an application for a construction permit for Channel 298C at Los Alamos, New Mexico, which he requested on the same day he filed the instant petition.

8. Channel 298C2 can be allotted to Ashland in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.3 kilometers (3.3 miles) west to avoid a short-spacing to Station KKRB, Channel 295C1, Klamath Falls, Oregon. Channel 292C3 can be allotted to Eagle Point with a site restriction of 3.1 kilometers (1.9 miles) northeast to avoid a short-spacing to Station KBOY, Channel 239C, Medford, Oregon.[6]

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Ashland, Oregon	270C, 298C2
Eagle Point, Oregon	292C3

10. The window period for filing applications for Channel 298C2 at Ashland and Channel 292C3 at Eagle Point will open on **January 5, 1993,** and close on **February 4, 1993.**

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[6] The coordinates for Channel 298C2 at Ashland are North Latitude 42-11-48 and West Longitude 122-46-23. The coordinates for Channel 292C3 at Eagle Point are 42-28-32; 122-45-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-158

In the Matter of

Amendment of Section 73.202(b), RM-8025
Table of Allotments,
FM Broadcast Stations.
(Palmer, Alaska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 15, 1992; Released: November 19, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 4843 (1992), issued in response to a petition filed on behalf of Pioneer Broadcasting Company, Inc. ("petitioner"), licensee of Station KWHL(FM), Anchorage, Alaska, proposing the substitution of Channel 238C1 for vacant Channel 239C1 at Palmer, Alaska.[1] Petitioner filed comments in support of the proposal. No other comments were received.

2. As stated in the *Notice*, the requested substitution of Channel 238C1 at Palmer is required to accommodate petitioner's application to relocate the transmitter for Station KWHL(FM) and to upgrade its facilities to full Class C status at Anchorage.[2] The distance between petitioner's preferred site at Anchorage[3] and Channel 239C1 at Palmer[4] is 35.3 kilometers, whereas a distance of 41 kilometers is required. In further support of the request, petitioner advised that it is limited in site flexibility as a result of the lack of area transmitter sites that would afford protection to the Commission's monitoring station in Anchorage, in addition to the ILS facilities at Elmdorf Air Force Base.

3. We believe the public interest would be served by substituting Channel 238C1 for Channel 239C1 at Palmer since it will provide Station KWHL(FM) an opportunity to expand its coverage area at Anchorage. Channel 238C1 can be allotted to Palmer in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without a site restriction.[5]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Palmer, Alaska	238C1

5. IT IS FURTHER ORDERED, That the window period for filing applications for Channel 238C1 at Palmer, Alaska, will open on **January 5, 1993** and close on **February 4, 1993.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 238C1 at Palmer, Alaska, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The *Notice* announced that the construction permit issued to Valley Broadcasting Co., Inc. for Station KUZN(FM) on Channel 239C1 at Palmer (File No. BPH-850228MF), was dismissed by letter on June 10, 1991, and therefore, a new filing window would be opened for the channel at the conclusion of this proceeding.

[2] Station KWHL's currently licensed facilities (100 kilowatts at -27 meters HAAT) is below the minimum now required for retention of Class C status, and therefore, is subject to a reclassification. *See Public Notice*, March 24, 1987, *Reclassification of FM Facilities Pursuant to BC Docket No. 80-90*, 2 FCC Rcd 2124 (1987). Petitioner's pending minor change application for Station KWHL(FM) (File No. BPH-870227MI), specifies 100 kilowatts ERP at 311 meters HAAT to conform with the Commission's reclassification policy.

[3] Coordinates at the site specified in petitioner's application for Channel 293C at Anchorage are 61-20-10 and 149-30-46.

[4] Coordinates for Channel 239C1 at Palmer are 61-38-39 and 149-21-34.

[5] Coordinates used for Channel 238C1 at Palmer are 61-36-00 and 149-06-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-252

In the Matter of

Amendment of Section 73.202(b), RM-8099
Table of Allotments,
FM Broadcast Stations.
(Leesburg and Tavares, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 15, 1992; Released: November 19, 1992

Comment Date: January 11, 1993
Reply Comment Date: January 26, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed on behalf of J. J. Taylor Companies, Inc. ("petitioner"), licensee of Station WXXL(FM), Channel 294C1, Leesburg, Florida, proposing the reallotment of Channel 294C1 from Leesburg, Florida to Tavares, Florida, as that community's first local service. Petitioner also seeks the modification of its license accordingly.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. In this regard, petitioner's proposal is mutually exclusive with the allotment of Channel 294C1 to Tavares, as it proposed no change in the present reference coordinates for Channel 294C1 at Tavares.[1] Petitioner states that the proposed allotment of Channel 294C1 to Tavares will place a 70 dBu signal over the community of Tavares. Petitioner argues that the reallotment of Channel 294C1 from Leesburg to Tavares will result in a preferential arrangement of allotments. Tavares (population 7,383) would receive its first local transmission service and Leesburg (population 14,903) will continue to receive local aural transmission service from Stations WLBE(AM) and WQBQ(AM).[2] Petitioner advises that while Leesburg is currently larger in population, Tavares is growing faster than Leesburg. Petitioner states that neither Leesburg nor Tavares is located in an urbanized area.

3. An engineering analysis has determined that Channel 294C1 can be allotted to Tavares in compliance with the Commission's minimum distance separation requirements with a site restriction 30.1 kilometers (18.7 miles) southeast of the community at the licensed site for Channel 294C1 at Leesburg. We note that the proposed allotment of Channel 294C1 to Tavares is short-spaced to a pending application (BPH-891129IB) for Station WDFL(FM), Channel 295C1, Cross City, Florida.[3]

4. We believe the public interest may be served by proposing to reallot Channel 294C1 from Leesburg to Tavares, Florida, since Tavares could receive its first local transmission service. As requested, we will propose to modify petitioner's license for Station WXXL(FM) to specify Tavares as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 294C1 at Tavares or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Leesburg, Florida	294C1	--
Tavares, Florida	--	294C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 11, 1993,** and reply comments on or before **January 26, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John M. Spencer
Leibowitz & Spencer
One S.E. Third Avenue, Suite 1450
Miami, Florida 33131
(Counsel for J.J. Taylor Companies, Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and com-

[1] The coordinates for Channel 294C1 at Tavares are North Latitude 28-33-31 and West Longitude 81-35-38.
[2] Population figures are taken from the 1990 U.S. Census.
[3] The Commission is currently considering a proposal to change the community of license for Station WDFL(FM), Channel 295C1, from Cross City, Florida to Bronson, Florida. *See Notice of Proposed Rule Making*, 7 FCC Rcd 5941 (1992).

ment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

T.C. MONTE, INC.

For a Construction Permit for a New FM Station on Channel 297C in Great Falls, Montana	File No. BPH-890313MW
For a Construction Permit for a New FM Station on Channel 270A in Hubbard, Ohio	File No. BPH-900122MZ
For a Construction Permit for a New FM Station on Channel 299A in Volcano, Hawaii	File No. BPH-900220MH
For a Construction Permit for a New FM Station on Channel 277A in Santa Claus, Indiana	File No. BPH-900108NY

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1992; Released: November 23, 1992

By the Commission:

1. The Commission has before it an Application for Review filed June 8, 1992 by T.C. Monte, Inc. ("Monte"). Monte seeks review of the Mass Media Bureau's ("Bureau") denial of its Petition for Reconsideration ("Petition") of the dismissal of the captioned applications for new FM stations in Great Falls, Montana; in Hubbard, Ohio; and in Volcano, Hawaii. Also before the Commission is Monte's Application for Review filed January 22, 1991, seeking review of a Bureau action granting in part Monte's Petition for Reconsideration concerning the fourth captioned application for a new FM station in Santa Claus, Indiana.

2. *The Great Falls, Hubbard, and Volcano applications.* The first three captioned applications were dismissed as "inconsistent applications" pursuant to 47 C.F.R. § 73.3518. *See Letter to T.C. Monte, Inc., and Jacor Broadcasting of Houston, Inc. from the Chief, Audio Services Division, Mass Media Bureau*, dated April 27, 1990 (reference 8920-MAE). At the time that the applications were filed, certain of Monte's principals held attributable interests in Jacor Communications, Inc. ("Jacor").[1] Jacor had attributable interests in nine FM stations, and Monte had 11 pending FM applications. Consistent with the normal procedures for applying the inconsistent application rule, the staff added to the nine Jacor stations the first three pending Monte applications by chronological order of filing and determined that the fourth, for Great Falls, Montana, plus seven subsequently filed applications, including those for Hubbard and Volcano,[2] must be dismissed as exceeding the Commission's multiple ownership limits. 47 C.F.R. § 73.3555.[3]

3. On June 12, 1990, Monte filed its Petition for Reconsideration, seeking reinstatement of the dismissed applications *nunc pro tunc*. In its petition, Monte variously argued that: (i) Section 73.3518 of the Commission's Rules is triggered only by inconsistent applications filed by the "same applicant," and that Monte and Jacor are not the "same applicant" for purposes of the rule; (ii) the applications in question could be granted in compliance with the multiple ownership provisions of Section 73.3555 by adding standard divestiture conditions; (iii) the inconsistent application rule is triggered only by operating stations, because the multiple ownership rules strictly limit only license ownership or control as opposed to applications for construction permits; and (iv) Commission precedent and practice is to assume that the less than controlling interests in conflicting applications will be divested inorder to ensure compliance with the ownership limitations.[4] Monte's Petition was denied. *See Letter to T.C. Monte, Inc., from the Chief, Audio Services Division, Mass Media Bureau*, dated May 7, 1992 (reference 8920-JR). The Bureau, citing *Premier Broadcasting, Inc.*, 7 FCC Rcd 867 (1992) ("*Premier* "), held that the instant situation was specifically addressed in the *Report and Order* in MM Docket No. 84-750, 50 Fed.

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[1] The Monte principals were Benjamin L. Homel ("Homel"), Robert L. Lawrence ("Lawrence"), and Frank E. Wood ("Wood"). At the time that the captioned applications were filed, each was a 33 1/3 percent stockholder, executive officer, and director of Monte. At that time Homel and Lawrence were also officers of Jacor, and Wood was both a Jacor officer and director. Wood also held 9.85 percent of Jacor's stock. The dismissal action was predicated on the attributable interests of the three Monte principals in Jacor as of the time that the captioned applications were filed.

[2] Appeals of the return of the other four applications were dismissed pursuant to settlement agreements approved on June 10, 1991, December 31, 1991, May 7, 1992, and October 22, 1991.

[3] Although the Commission set the general ownership limit at 18 stations in a given service by action in MM Docket 91-140, released July 30, 1992, the 12-station limit was in effect when Monte filed these applications.

[4] None of the applications dismissed in the April 27, 1990 letter contained a divestiture pledge. As stated in footnote 13 of the Bureau's May 7, 1992 letter denying reconsideration,

> in several pre-hard look cases, inconsistent applications were not dismissed when, at the time of filing of the later application, the applicant made an *unequivocal* promise that the earlier filed application had been or would be shortly dismissed. Monte made no such unequivocal statement and is simply incorrect in asserting that the Commission will make a presumption that an applicant will divest of its minority interest in order to comply with the multiple ownership rules. Absent an unequivocal promise to divest, *Big Wyoming Broadcasting Corp.* [2 FCC Rcd 3493 (1987)] indicates that the later-filed application will simply be dismissed.

Reg. 19,936 (May 13, 1985) ("*FM Processing*")[5] which adopted the FM "hard look" processing standards. There, the Commission held that the multiple ownership rules and attribution standards will establish the maximum number of existing stations and pending applications permitted, with any applications filed in excess of the multiple ownership limits considered "inconsistent" and hence violative of Section 73.3518 of the Rules. *Id.* at 19,940, para. 24 and n.27. The Bureau therefore concluded that the cognizable interests of Monte's principals in Jacor and its stations as of the time the subject applications were filed were attributable to Monte, making Monte's applications that exceeded the numerical limitation "inconsistent" and, thus, properly returned.

4. In its application for review, Monte now argues that it was not given explicit prior notice of the requirements which led to dismissal of its applications. Monte reiterates its contention that it and Jacor are not the "same applicant" for multiple ownership purposes, adding that the Bureau did not address this contention. Application at 4-5. Specifically, Monte references Commission actions which, it says, explained how the agency would calculate the maximum number of FM applications permitted, citing *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments* ("*Second Report and Order*"), 101 FCC 2d 638, 648-49 (1985); and *FM Processing*. Application at 6. According to Monte, although the decision denying its Petition and *Premier*, cited therein, rely on the *Second Report and Order* as providing notice of a change in the interpretation of Section 73.3518, the only notice of a new policy in either of the 1985 *Orders* was a statement that cognizable interests would count in the 12-station limit, and both documents speak in terms of the "same applicant." *Id.* Monte argues that nowhere in its 1985 *Orders* had the Commission indicated that it would count the cognizable interests of an applicant's attributable parties as well as the applicant's own cognizable interests. *Id.* at 8-9.

5. We disagree. As we concluded in *Premier* and recently affirmed in *Treasure Coast Media, Inc.*, 7 FCC Rcd _____ (1992), we provided explicit notice of our current policy relating to cognizable interests of an applicant in the context of the multiple ownership and inconsistent application provisions of the Rules. Specifically, in Paragraph 24 of *FM Processing*, we stated:

> As an additional component of our "hard look" approach, we reiterate our position with respect to multiple applications. Applicants will not be permitted to "flood the Commission's processing line and hearing docket with multiple applications many of which could not be granted under our multiple ownership rules." *Storer Broadcasting Co.*, 43 FCC 1254, 1256 (1953). Accordingly, we shall regard Section 73.35555 as establishing the maximum number of applications acceptable for filing by an applicant. Applications tendered in excess of this number shall be considered inconsistent with § 73.3518 and returned as unacceptable for filing. In this regard, we note that the stations in which the applicant currently holds a *cognizable interest* would be taken into account in determining the maximum number of acceptable applications.

50 Fed. Reg. at 19,940 (emphasis added, footnote omitted). The consequence of this policy is that Monte and Jacor are treated as the "same applicant" for "hard look" processing purposes. The cognizable media interests of its principals are attributable to Monte. As we stated in *Premier*, "it is the presence of such cognizable interests that triggers applicability of the inconsistent application rule, or, to state the matter somewhat differently, *applicants are considered the "same" for purposes of the inconsistent application rule if the applicants hold interests in each other cognizable under the multiple ownership rules.*" 7 FCC Rcd at 869 (emphasis added). Prior to *FM Processing*, FM applicants could file inconsistent applications which patently violated the multiple ownership rules *vis-a-vis* earlier-filed applications or existing stations, so long as the principal common to both entities held less than a controlling interest in either. That person was then permitted by the staff to elect to withdraw from either entity. This election was, in substance, a waiver of the inconsistent application rule. This election/waiver policy, however, was deemed no longer consistent with the public interest in the Commission's "hard look" rules, which established processing standards necessary to deal effectively with the many thousands of FM applications filed after the opening of the 689 new FM channels made available by BC Docket 80-90. Paragraph 24 of *FM Processing* reflects this position. *See Id.* at 869.[6] Accordingly, Monte's arguments must fail, and its application for review of the dismissal of its Great Falls, Hubbard, and Volcano applications will be denied.[7]

6. *The Santa Claus application.* Monte's Santa Claus application was initially returned in the same action dismissing the above three captioned applications. As noted in the reconsideration action, *See Letter to T.C. Monte, Inc. from the Chief, Audio Services Division, Mass Media Bureau*, December 21, 1990 (reference 8920-ALM), the application as originally filed contained no divestiture pledge. However, a

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[5] The *Report and Order* in *FM Processing* was reprinted at 58 RR 2d 776 (1985).

[6] The Commission recently modified the "hard look" processing rules, and made these rules effective as of _____, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd _____ (adopted July 16, 1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt.

[7] Monte asserts that the Great Falls application should not have been dismissed, claiming that Jacor was the licensee of eight, not nine, FM stations at the time the applications in question were filed. According to Monte, although the Commission had granted Jacor's application to acquire KSMB, Seguin, Texas, that acquisition had not been consummated. Commission grant of an assignment application assumes consummation for purposes of the inconsistent application rule. *Cf. Agnes J. Reeves Greer*, 45 FCC 2272 (1965). Were we not to count such assignment transactions as of the date of Commission approval, the staff would in some cases thereafter process applications which could not be granted because of subsequent consummation of earlier approved assignments. This would clearly contravene the underlying purpose of the inconsistent application rule, which is to insure that the staff does not delay service to the public by expending its limited resources processing applications which cannot all be granted. *See Valley Broadcasting Co.*, 58 RR 2d 945 (1985).

February 22, 1990 amendment did contain a divestiture pledge. Accordingly, pursuant to the Commission's February 9, 1990 *Public Notice* entitled "Four Policy Changes in Processing of Commercial FM Construction Permit Applications for New Facilities," 5 FCC Rcd 990 (1990), the Bureau reinstated the Santa Claus application *nunc pro tunc*.[8]

7. In its second application for review, Monte takes issue with the divestiture condition imposed in the Bureau's December 21, 1990 reinstatement letter, which statement varied from the wording contained in Monte's February 22, 1990 amendment. Specifically, Monte objects to the following: "...prior to commencement of program test authority, T.C. Monte will be required to demonstrate that its principals have divested all cognizable interest in and severed all connections with Jacor Communications and its wholly owned subsidiaries." Application at 6. Monte seeks review "for the limited extent of instructing the Division that the Santa Claus application may be processed and granted with, at most, the condition that the TCM principals will have divested themselves of their Jacor interests and connections prior to commencement of program test authority, or shall divest at any time thereafter, *if necessary for compliance with Section 73.3555*." *Id.* at 8.

8. An examination of Commission records reveals that Jacor and its affiliates currently are the licensees of six FM stations and that Monte's FM interests are now limited to five pending applications. Thus, the total FM interests of Monte and Jacor are presently less than the allowable ceiling. Accordingly, no divestiture will be required in connection with grant of the Santa Claus application, and the subject application for review will be dismissed as moot.

9. In view of the foregoing, IT IS ORDERED, that the Application for Review filed June 8, 1992 by T.C. Monte, Inc. IS DENIED. IT IS FURTHER ORDERED, that the condition of grant of BPH-900108NY IS REMOVED and the Application for Review filed January 22, 1991 by T.C. Monte, Inc. IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[8] Because Monte was the sole applicant for the Santa Claus allotment, the following provision of the February 9 *Public Notice* was applicable: "In situations where only one application has applied in a filing window, the staff will waive the "hard look" rules to permit one opportunity to correct tenderability defects and one opportunity to correct acceptability defects in response to Commission deficiency letters...."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-179

In the Matter of

Amendment of Section 73.202(b), RM-8046
Table of Allotments,
FM Broadcast Stations.
(State College, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 3, 1992; Released: November 20, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 5473 (1992), issued in response to a petition filed by PDB Corporation ("petitioner"), proposing the substitution of Channel 283C3 for Channel 282A at State College, Mississippi. Petitioner also requested modification of its construction permit (BPH-920603JY) for Station WUMI(FM), Channel 282A, to specify operation on Channel 283C3.[1] Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 283C3 for Channel 282A at State College, Mississippi, since it would provide a wide coverage area station to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] In addition, we have authorized a modification of the construction permit for Station WUMI(FM), Channel 282A, State College, Mississippi, to specify operation on Channel 283C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
State College, Mississippi	283C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WUMI(FM), Channel 282A, State College, Mississippi, IS MODIFIED to specify operation on Channel 283C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, PDB Corporation, permittee of Station WUMI(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The construction permit for Station WUMI(FM), Channel 282A, was reinstated on July 8, 1992.
[2] The coordinates for Channel 283C3 at State College are 33-24-00 and 88-53-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-181

In the Matter of

Amendment of Section 73.202(b), RM-8044
Table of Allotments,
FM Broadcast Stations.
(Tomah, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 3, 1992; Released: November 20, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 5469 (1992), issued in response to a petition filed by Magnum Radio, Inc. ("petitioner"), proposing the substitution of Channel 241C2 for Channel 241A at Tomah, Wisconsin. Petitioner also requested modification of its construction permit (BMPH-900726IA) for Station WBOG, Channel 241A, to specify operation on Channel 241C2. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substitution of Channel 241C2 for Channel 241A at Tomah, Wisconsin, since it would provide additional reception service for the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] In addition, we have authorized a modification of the construction permit for Station WBOG, Channel 241A, Tomah, Wisconsin, to specify operation on Channel 241C2, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Tomah, Wisconsin	233A, 241C2, 255C

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WBOG, Tomah, Wisconsin, IS MODIFIED to specify operation on Channel 241C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Magnum Radio, Inc., permittee of Station WBOG, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 241C2 are 44-01-50 and 90-49-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-182

In the Matter of

Amendment of Section 73.202(b), RM-8047
Table of Allotments,
FM Broadcast Stations.
(St. Charles, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 3, 1992; Released: November 20, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 5467 (1992), issued in response to a petition filed by St. Charles Broadcasters ("petitioner"). The *Notice* proposed the allotment of Channel 299A to St. Charles, Minnesota, as that community's first local broadcast service. Petitioner filed comments reaffirming its interest in the allotment of Channel 299A at St. Charles.

2. We believe the public interest would be served by allotting Channel 299A to St. Charles, Minnesota, as it will provide the community with its first local service. Channel 299A can be allotted to St. Charles, Minnesota, consistent with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
St. Charles, Minnesota	299A

4. The window period for filing applications for Channel 299A at St. Charles will open on **January 5, 1993,** and close on **February 4, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 299A at St. Charles are 43-58-24 and 92-04-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-180

In the Matter of

Amendment of Section 73.202(b),	RM-8048
Table of Allotments,	
FM Broadcast Stations.	
(Houghton, Michigan)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 3, 1992; Released: November 20, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 5471 (1992), issued in response to a petition filed by Houghton Radio Group of North Carolina, Inc. ("petitioner"), proposing the substitution of Channel 272C2 for Channel 272A at Houghton, Michigan.[1] Petitioner also requested modification of its construction permit for Station WAAH(FM), Channel 272A, to specify operation on Channel 272C2. Petitioner filed comments in which it reaffirmed its interest in the channel.[2] No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 272C2 for Channel 272A at Houghton, since it would provide expanded reception service to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[3] Since Houghton is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, we have authorized a modification of the construction permit for Station WAAH(FM), Channel 272A, Houghton, Michigan, to specify operation on Channel 272C2, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Houghton, Michigan	242C1, 249A, 272C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WAAH(FM), Houghton, Michigan, IS MODIFIED to specify operation on Channel 272C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Houghton Radio Group of North Carolina, Inc., permittee of Station WAAH(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The assignment of the construction permit for Station WAAH(FM) from WAAH Acquisition Partnership to Houghton Radio Group of North Carolina, Inc. was granted on May 26, 1992 (BAPH-920204HK) and consummated on July 10, 1992. The construction permit was reinstated on May 26, 1992 (BPH-870326MD and BPH-890628JX).

[2] In response to the *Notice*, petitioner provided an affidavit verifying the statements in its petition for rule making.

[3] The coordinates for Channel 272C2 are 47-09-43 and 88-35-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-494

In the Matter of

Amendment of Section 73.202(b),	RM-7473
Table of Allotments,	RM-7571
FM Broadcast Stations.	
(Cottage Grove and	
Brownsville, Oregon)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 9, 1992; Released: November 20, 1992

By the Chief, Policy and Rules Division:

1. At the request of McKenzie River Broadcasting Corporation ("petitioner"), the Commission has before it a petition for reconsideration of the *Report and Order* ("*R&O*") in this proceeding, 7 FCC Rcd 1368 (1992), which allotted Channel 263A to Cottage Grove, Oregon, and substituted Channel 272C1 for Channel 272A at Brownsville, Oregon. An opposition to the petition was filed by Thornton Pfleger Inc., d/b/a KNND-AM ("KNND"), Cottage Grove.

2. The *R&O* granted a petition for rule making filed by Paul C. Bjornstad ("Bjornstad"), who originally proposed the allotment of Channel 273A to Cottage Grove, Oregon, as the community's second local FM transmission service. We instead allotted Channel 263A to Cottage Grove in order to accommodate a counterproposal seeking the substitution Channel 272C1 for Channel 272A at Brownsville and modification of the construction permit for Station KGAL-FM, Channel 272A, Brownsville, accordingly.

3. Petitioner states that it has a network of three translator stations in Oregon which will operate on Channel 265 (100.9 MHz), including an operational station in Cottage Grove. Petitioner states that it will be adversely affected by the use of Channel 263A at Cottage Grove because it will have to change the frequency of its translator and publicize the change in channels. Petitioner argues that with a population of 7,000, Cottage Grove does not need two local FM Class A channels, especially at the expense of its translator station. Petitioner also claims that the original petitioner for the Cottage Grove channel no longer intends to apply for the channel.

4. Petitioner also contends that no public notice was given for the Commission's use of Channel 263A, instead of Channel 273A as initially proposed. *See Notice of Proposed Rule Making*, 5 FCC Rcd 6351 (1990)("*Notice*"). Petitioner notes that the substitution was implemented at the suggestion of Eads Broadcasting Corporation, permittee of Station KGAL-FM, in order to accommodate its proposed upgrade. Petitioner contends that had it known of the proposed change, it would have intervened in the proceeding to voice its opposition.

5. Finally, petitioner maintains that the Cottage Grove allotment is technically defective due to the 5 MHz separation between Channel 263A and Channel 288A, which was previously allotted to Cottage Grove. It claims that only one site is available for a transmitter for Channel 263A, which is the same site proposed in an application (BPH-910923MG) for Channel 288A. The use of the same site, claims petitioner, will cause intermodulation problems on two-way communication services such as cellular telephones and other land mobile installations. Petitioner includes statements from three engineers claiming that co-location could result in intermodulation interference.

6. In opposing comments, KNND, which has filed an application for Channel 263A (BPH-920430MF), argues that the community needs a locally owned and operated FM station. KNND disagrees that the use of Channels 288A and 263A in Cottage Grove will cause any significant intermodulation problems. KNND states that the transmitter site for Channel 263A will be located at a site different than the one proposed for Channel 288A, contrary to petitioner's claim that no other suitable transmitter site is available. Furthermore, KNND maintains that any intermodulation problems that may arise could be resolved at the time the new facility is constructed.

7. We will deny the petition for reconsideration. As an initial matter, we disagree that no public notice was given for the Commission's action in Cottage Grove. Although the *Notice* in this proceeding proposed the allotment of Channel 273A to Cottage Grove, it also stated that the filing of a counterproposal may lead to the allotment of a different channel than originally requested. *See* Paragraph 3(c) of the Appendix to the *Notice*. Petitioner therefore had notice that an alternate channel could be used. The fact that an alternate channel was suggested in late-filed comments does not preclude us from ascertaining the availability of a channel on the basis of our own channel study. *See Lawton, Oklahoma*, 4 FCC Rcd 1807 (1989).

8. Petitioner contends that a station operating on Channel 263A will disrupt the operation of its translator stations, thus requiring it to change the translator's frequency in Cottage Grove. Our policy regarding FM translators is clear. Translators are considered a secondary use of a frequency. *See* 47 CFR §74.1203 of the Commission's Rules. Therefore, the fact that the allotment of a new FM channel may require an existing translator to change the channels is not a sufficient basis to deny the allotment proposal.

9. Petitioner also argues that the use of both Channels 263A and 288A at Cottage Grove will interfere with the operation of cellular telephones and other land mobile installations. We find that petitioner's arguments are speculative. Although petitioner has provided statements from three engineers, these statements are unsupported by any technical showing.[1]

[1] Furthermore, the allegations of potential intermodulation interference are premised on the use of the same transmitter site for both channels. We note that the applications for Channels 263A and 288A propose different sites.

10. Finally, petitioner argues that Channel 263A should be deleted because the original petitioner no longer intends to apply for the channel. However, an application for a construction permit has been filed by KNND. Therefore, since an application has been filed, we do not believe the public interest would be served by the deletion of the channel.

11. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by McKenzie River Broadcasting Corporation IS DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-577

In re Applications of

LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	File No. BPH-870831MI
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870831MJ
BILTMORE FOREST BROADCASTING FM, INC.	File No. BPH-870831MK
SKYLAND BROADCASTING COMPANY	File No. BPH-870831ML
ORION COMMUNICATIONS LIMITED	File No. BPH-870831ME

For a Construction Permit
For a New FM Station in
Biltmore Forest, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1992; Released: November 23, 1992

By the Commission:

1. In *National Communications Industries*, 7 FCC Rcd 1703 (1992), the Commission selected Orion Communications as the comparative winner under the standard comparative issue based upon its quantitative integration proposal. In doing so, it affirmed the Review Board's disqualification of Liberty Productions and Biltmore Forest Broadcasting FM, Inc. on transmitter site issues, and its award of 100% integration credit to Orion and only partial credit to Willsyr Communications and Skyland Broadcasting Company.

2. The four unsuccessful applicants seek reconsideration. Willsyr and Skyland challenge our selection of Orion on comparative grounds. Liberty and BFBFM also dispute their disqualification on the transmitter site issues. In addition, Willsyr has filed a motion to enlarge issues and a further motion to enlarge issues seeking the addition of financial, lack of candor, misrepresentation and reporting issues against Orion.

3. Based on the pleadings before us,[1] we reaffirm our comparative selection of Orion over Willsyr and Skyland. We also reaffirm our disqualification of Liberty and BFBFM on the transmitter site issues. We find further that Willsyr has not raised a question of probable decisional significance warranting further inquiry. We therefore deny the pending petitions for reconsideration as well as the motions to reopen the record and to enlarge the issues.

I. MOTIONS TO REOPEN THE RECORD AND TO ENLARGE THE ISSUES

4. We turn first to the motions to reopen the record and to enlarge the issues that have been filed against Orion. For the reasons that follow, we find that the motions are untimely and that Willsyr has not met its burden of showing a substantial and material question of fact and such substantial likelihood of proving its allegations as to require further hearings despite the untimeliness of the motions. They are therefore denied.

5. *Background:* Willsyr seeks the addition of financial qualifications, misrepresentation, lack of candor, and 47 C.F.R. § 1.65 reporting issues against Orion. It faults Orion for not reporting the imposition of federal tax liens against Orion's 40% owner, Zebulon Lee, and against commonly owned station WSKY(AM), Asheville, North Carolina, that date from March 21, 1990 and allegedly total almost $225,000. It contends that the liens are matters of decisional significance that should have been reported under section 1.65, inasmuch as Orion relies on Zebulon Lee and on the proceeds from the sale of WSKY to establish its financial qualifications.

6. In its further motion to reopen the record and to enlarge the issues, Willsyr also faults Orion for not having a formal appraisal of WSKY's fair market value at the time of certification. It therefore seeks issues to determine whether Orion had reasonable assurance of its financial qualifications at the time of certification, whether it re-

[1] The following pleadings are pending before the Commission: (a) motion for stay and petition for reconsideration, filed March 30, 1992, by Skyland Broadcasting Company; (b) petition for reconsideration, filed March 30, 1992, by Biltmore Forest Broadcasting FM, Inc.; (c) petition for reconsideration, filed March 30, 1992, by Willsyr Communications, Limited Partnership; and (d) petition for reconsideration, filed March 27, 1992, by Liberty Productions, a Limited Partnership; (d) opposition to motion for stay, filed April 9, 1992, by Orion Communications Limited; (e) consolidated opposition to petitions for reconsideration, filed April 10, 1992, by Orion; and (f) reply, filed April 21, 1992, by Skyland. Also before the Commission are: (a) motion to reopen the record and to enlarge the issues, filed April 3, 1992, by Orion; (b) opposition, filed April 16, 1992, by Orion; (c) supplement to opposition, filed April 20, 1992, by Orion; (d) reply to opposition, filed April 24, 1992, by Willsyr; (e) further motion to reopen the record and to enlarge the issues, filed April 24, 1992, by Willsyr; (f) opposition, filed May 7, 1992, by Orion; and (g) reply to opposition, filed May 14, 1992, by Willsyr. In response to an order (FCC 921-56, released on June 24, 1992), issued under delegated authority by the general counsel, the following pleadings have also been filed: (a) response to order of June 24, 1992, by Orion Communications Limited; (b) reply to response, filed July 10, 1992, by Willsyr; (c) comments, filed July 10, 1992, by Biltmore Forest Broadcasting FM, Inc.; (d) comments, filed July 10, 1992, by Skyland.

mains financially qualified in light of the unreported tax liens, and whether the failure to report those tax liens involved a lack of candor.

7. In opposition, Orion explains that it did not report the tax liens under section 1.65 because there was never any reason to believe that the liens adversely affected its financial qualifications. It asserts that it has always relied on a $300,000 bank letter, rather than on the proceeds from the proposed sale of WSKY, to establish its financial qualifications. It claims further that the liens do not affect the availability of the bank loan, and that the bank's only interest in the sale of WSKY is in assuring that it would have a part security interest in any deferred payment due under a sales contract for WSKY.

8. Noting that the Commission does not inquire into a financial institution's lending judgments, Orion disputes the need for a formal appraisal of WSKY either at the time of certification or in March 1990, when the tax liens were first levied against WSKY.[2] It claims that WSKY's market value always exceeded its estimated costs of $300,000 plus the amount of the tax liens, and that the liens have been substantially satisfied.[3] In reply, Willsyr disputes Orion's reading of the bank letter. Its view is that the letter clearly provides that the proceeds of the WSKY's sale are collateral for, and thus critical to the availability of, the $300,000 loan.

9. In response to an order (*National Communications Industries*, FCC 92I-056, released June 24, 1992), issued by the General Counsel under delegated authority, Orion submits a letter, dated July 1, 1992, from the First Union National Bank of North Carolina. The bank certifies that, notwithstanding the tax liens levied against Zebulon Lee and against WSKY, it is willing to loan $300,000 to Orion. The bank further clarifies that "proceeds from the proposed sale of WSKY do not affect the availability or the amount of [the] prospective loan to Orion."

10. In reply, the competing applicants urge that the July 1, 1992 bank letter does not resolve the substantial and material questions of fact raised here. In their view, there is a discrepancy between the two letters concerning the need for the proceeds of WSKY's sale as collateral. Noting Orion's reliance on the November 1987 letter in certifying its financial qualifications, they contend that Orion has thus modified its financial proposal and that it must file an amendment and demonstrate good cause for this revision. In the alternative, they submit that, if the two letters are deemed to be consistent, Orion does not have reasonable assurance of financing because the 1987 letter, as clarified by the 1992 letter, must be a mere accommodation letter.

11. *Discussion:* We have examined Willsyr's issue requests in light of the standards governing petitions to enlarge the issues and motions to reopen the record. A motion to enlarge issues must rely on new or newly discovered facts and must be filed promptly after such facts could have reasonably been discovered. To be considered on the merits, an untimely motion to enlarge issues must raise a question of probable decisional significance and such substantial public interest importance as to warrant consideration despite its untimeliness.[4] Where, as here, the record has already been closed, the motion must show that it relies on evidence that could not, through the exercise of due diligence, have been discovered earlier, and that the new evidence, if proven, would affect the ultimate disposition of the proceeding as well as that there is a substantial likelihood of proving its allegations.[5] Viewed by these standards, Willsyr's motions must be denied.

A. Due Diligence

12. Willsyr's motions to reopen the record do not rely on new facts or on newly discovered facts that could not have been reasonably discovered earlier, or demonstrate why it was not possible to file the motion within 15 days of the imposition of the tax liens, as required by section 1.229(b) for motions to enlarge issues that are not filed within 30 days of the Hearing Designation Order. Instead of filing its motions within fifteen days of the imposition of the first tax lien on March 21, 1990 (i.e., a full year before the Board's decision and almost two years before the Commission's decision), as required by section 1.229(b), Willsyr filed them more than two years after the tax liens could reasonably have been discovered.

13. Willsyr offers no explanation for this delay. Conceding that Orion relied on the 1987 bank letter in certifying its financial qualifications, Willsyr argues that, given Orion's reliance on Zebulon Lee and on the proposed sale of WSKY in securing that bank letter, the liens jeopardized Orion's financing. As Orion notes, however, Willsyr received a copy of Orion's financial proposal -- which was always based on a bank letter -- during discovery. See Orion's April 16, 1992 Opposition, Declaration of Zebulon Lee. Thus, to the extent that Willsyr claims that Lee and WSKY are critical to the continued availability of the bank letter, it could have, through the exercise of due diligence, discovered the tax liens (which were first imposed in 1990), and presented its arguments concerning their significance long before the Commission issued its decision.

14. We have consistently refused to order further proceedings to explore matters that are "easily discoverable initially and only deemed crucial when seen from the highland of hindsight."[6] Given Willsyr's lack of diligence, enlarging the issues at this late stage of the proceeding would undermine the efficiency of our adjudicatory process. As we have indicated, reopening the record to consider information which could "reasonably have been

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[2] Orion also disputes the amount of the tax liens. It notes that Willsyr has included a $89,432.44 lien that was levied against Zebulon Lee in connection with valuable country club lots owned by Lee and his wife, and that the lien was released by the IRS after the sale of those lots in February 1992. Thus, it alleges that the liens total less than $136,000, rather than the "almost 225,000," claimed by Willsyr.

[3] Orion asserts that the Internal Revenue Service has agreed that payments of more than $122,000, which have been made since March 1991, cover the taxes and interest owed by WSKY and by Zebulon Lee. It notes that, in light of these substantial payments, Zebulon Lee has requested a waiver of the penalties claimed by the IRS (and included in the liens).

[4] See 47 C.F.R. § 1.229; *Great Lakes Broadcasting*, 6 FCC Rcd 4331 (1991). Under section 1.229(c) issues of "substantial public interest importance" would include questions concerning Orion's basic qualifications, and "a showing of probable decisional significance" requires that Willsyr demonstrate such a substantial likelihood of proving its allegations as to outweigh the public interest benefits inherent in the orderly administration of the Commission's business. *Great Lakes*, 6 FCC Rcd at 4332 ¶ 9.

[5] *Omaha TV 15*, 4 FCC Rcd at 730-31 ¶ 6, citing *American Int'l Development, Inc.*, 86 FCC 2d 808, 811 ¶ 5 (1981).

[6] *Omaha TV 15*, 4 FCC Rcd 730, 731 ¶ 7 (1988), citing *Guinian v. FCC*, 297 F.2d 782, 787 (D.C. Cir. 1961).

discovered earlier" would undermine the goals of expediting "the hearing process and the institution of new service."[7] While levied after the record in this case was closed, the liens against WSKY and against Lee personally could have been discovered, and any arguments concerning their relevance to Orion's basic qualifications presented, before the Review Board and the Commission affirmed the ALJ's selection of Orion.

B. Decisional Significance

15. Having concluded that the motions were not timely filed, we must determine whether, pursuant to section 1.229(c), they "raise a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of [their] untimely filing." We answer this question in the negative below and, thus, Willsyr's allegations have no effect on the outcome of this proceeding. In order to establish that the unreported liens raise a substantial and material question warranting further inquiry, Willsyr must show a substantial likelihood of proving that the liens jeopardize the availability of the $300,000 bank loan, thereby adversely affecting Orion's financial qualifications.[8]

16. However, Orion has submitted a letter, dated July 1, 1992, from the bank. Obtained in response to the General Counsel's request for further information, the bank unequivocally states that "our willingness to make the loan to Orion is not contingent on our receiving proceeds from the sale of WSKY," or upon "the amount of the proceeds realized from the sale of WSKY." The letter further confirms the bank's awareness of the tax liens levied against WSKY and against Zebulon Lee personally, and of the disputed penalties. The bank states that neither the liens nor the unpaid penalties affect its "willingness to lend up to $300,000.00 to Orion for the Biltmore Forest FM station in accordance with the terms of our November 1987 letter."

17. Willsyr urges, however, that the 1992 letter materially changes the bank's original commitment. Citing *Aspen FM*, 6 FCC Rcd 1602 ¶ 6 (1991), where we indicated our intent to rely on the express terms of a loan agreement rather than on the self-serving and conflicting testimony of the applicant's witnesses, Willsyr maintains that no credence can be given to the July 1, 1992 letter. We disagree. In *Aspen*, the applicant sought to rely on oral testimony that directly contradicted express terms in the parties' written pre-certification agreement as to whether the lender would provide all, or only part of, the funds needed to construct and operate the proposed facility for three months. Here, however, there is no conflict between the original 1987 and the 1992 bank letters as to any matter, and there is no other evidence in the record undermining the bank's original $300,000 loan commitment to Orion. Rather, the arguably conflicting language was in two separate provisions of the bank's 1987 letter, and the 1992 letter merely resolves the ambiguity concerning the bank's original intent with respect to the proceeds from WSKY's sale. In this regard, the 1992 letter expressly confirms the bank's original $300,000 loan commitment to Orion, stating that "[i]t was not (and is not) [the bank's] intention to fund the loan form [sic] such proceeds," and that "[w]hat we meant (and mean) in our November 1987 letter is that we would want a security interest in whatever such proceeds you (Orion) may receive during the period covered by our loan."[9]

18. Because the bank has not modified in any way its original $300,000 commitment to Orion, we reject the claim that, by submitting the July 1, 1992 letter, Orion has, in effect, amended its financial proposal, thereby requiring a good cause showing under 47 C.F.R. § 73.3522 of the rules, governing post-designation amendments.[10] By the same token, we disagree that the 1987 letter was "clear and unequivocal" that "any loan would be subject to Station WSKY-AM being sold and that the sale proceeds would be used as collateral." Willsyr's Reply, filed May 14, 1992, at 2.

19. The bank's intention with respect to the proposed sale of WSKY is, admittedly, not clear on the face of the 1987 bank letter.[11] The bank stated that "[w]e intend by this letter to give you reasonable assurance of our intention to make the [$300,000] loan on the terms and conditions indicated." Aware that Lee intended to sell WSKY before the new FM station begins operation, the bank indicated in the 1987 letter that "[it] would expect to rely on the value of WSKY and the assets which its sale would make available for funding the new station and/or to collateralize any

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[7] See *Great Lakes*, 6 FCC Rcd at 4333 ¶ 15.

[8] Willsyr faces a heavier burden than did the applicant in *Las Americas Communications*, 101 FCC 2d 728, 731-32 ¶ ¶ 5-6 (Rev. Bd. 1985). There, the Board found that tax liens levied against an individual directly responsible for financing the application raised questions of probable decisional significance and such substantial public interest importance as to warrant consideration even though the petition to enlarge issue was untimely filed. However, the issue request had been filed with the ALJ before the record was closed, rather than after the Commission had issued its decision. Moreover, the tax liens involved in that case were levied against an individual who was partially responsible for financing the applicant rather than merely against an asset allegedly relied on by the bank to collateralize the loan. Thus, *Las Americas*, which Willsyr relies on, is clearly distinguishable.

[9] We do not deem it critical that the author of the 1987 bank letter no longer works at the bank. In the absence of evidence to the contrary, there is no reason to question the authority of the bank employee that prepared the 1992 clarifying letter to speak for the bank. Willsyr, which has the burden in this regard, has proffered no such evidence. Nor are we troubled under these circumstances by the fact that the letter is unsworn because there is no requirement to that effect.

[10] See *Aspen FM, Inc.*, 6 FCC Rcd 1602 (1991). See also *Texas Communications Ltd. Partnership*, 7 FCC Rcd 3186, 3187 ¶ ¶ 7-8 & n.4 (1992) (a formal amendment is required when an applicant changes its financial proposal).

[11] We reject the claim that Orion's financial certification was deficient because it did not have a formal appraisal of WSKY prior to certification. Although Lee believed that proceeds from the sale of WSKY would be sufficient to fund the new station, Orion relied at the time of certification, and still relies today on the bank loan. Declaration of Zebulon C. Lee, at 2. As noted above, the bank has indicated that "[its] willingness to make the [$300,000] loan to Orion does not depend on the amount of the proceeds realized from the sale of WSKY." And, as reflected below, we do not agree that the 1987 bank letter was a mere accommodation letter. Moreover, as Orion notes, we do not inquire into a bank's lending judgment. Thus, there is no reason to require Orion to furnish any formal appraisals or other evidence concerning WSKY's fair market value either at the time of certification, or at any time thereafter.

necessary borrowings." The letter also included the following term: "SECURITY: Pledge of stock of corporation and liquid assets provided from the sale of WSKY."

20. Despite the discrepancies in the letter, we do not find, as Willsyr urges, that "[t]he letter explicitly states that any loan would be subject to Station WSKY-AM being sold and that the sale proceeds would be used as collateral." Willsyr's May 14, 1992 Reply, at 2. In our view, it is not unreasonable that, as Orion claimed and as the bank has now confirmed, the 1987 letter did not intend to condition the loan on the sale of WSKY, but "[wa]s talking about a *security* interest" in any deferred payments due under a sales contract for WSKY and an additional security interest in the corporate stock. Orion's May 7, 1992 Opposition, at 4 (emphasis in the original). It makes no sense, as Orion points out, that the bank would be willing to lend the money only conditioned on Orion raising that amount by selling WSKY. The non-contingent nature of the bank's $300,000 commitment seems all the more reasonable because the letter also requires a pledge of the corporate stock as security for the loan, thereby assuring the bank a means of recouping the loan in the event WSKY were not sold and a default occurred. In other words, the original letter did not explicitly specify that the loan commitment to Orion was contingent on the sale of WSKY. Thus, there was no need for Orion to report the tax liens against WSKY.

21. Willsyr urges, however, that the original bank letter, as clarified by the bank, is so "incredible on its face and contrary to normal and sound lending practices" as to raise a substantial and material question that the bank letter is a mere accommodation to Orion. Willsyr's Reply to Response at 3. As set forth below, we do not agree that either letter is a mere accommodation to Orion. Moreover, to the extent that Willsyr urges that the bank loan must be contingent on WSKY's sale, it has not explained why it did not raise its arguments concerning the tax liens and WSKY's fair market value in a more expeditious manner. Clearly, if Willsyr believed that the proceeds from WSKY's sale were collateral for, and thus critical to the availability of, the $300,000 bank loan, it could have raised any arguments relating to the value of WSKY much earlier. As noted above, it is incumbent upon applicants to study their opponents' cases carefully and make their arguments as early as possible.[12]

22. Nor has Willsyr raised a substantial and material question that the bank letter is a mere accommodation letter (i.e., that it does not represent a substantive agreement or tentative commitment to loan the necessary money to Orion). To the extent that Willsyr relies on the bank's statement disclaiming any reliance upon proceeds from the sale of WSKY, it is not our practice to second-guess the bank's lending judgment.[13]

23. Rather, our concern is whether a bank letter affords reasonable assurance of committed funding to construct the proposed facility and operate for three months without station revenues. To determine reasonable assurance of a bank loan, we generally consider the following factors: whether the borrower's qualifications have been preliminarily reviewed by the bank; whether adequate collateral has been demonstrated; and whether the tentative terms are specifically identified and acceptable to the lender as well as the borrower.[14]

24. In support of their contention that the 1987 letter is a mere accommodation letter, the competing applicants rely on the fact that the letter does not affirmatively state that there is an established relationship between the Lee Family and the bank or that the bank has requested -- and that the Lees have furnished -- financial information from which the bank can assess their financial wherewithal. However, Willsyr has cited no Commission case requiring that valid commitment letters must contain an express statement from the bank that it has reviewed, and is sufficiently satisfied with, the borrower's financial wherewithal.

25. Nothing in either letter suggests that the bank had omitted these usual preliminaries. In contrast, the November 1987 letter expressed a present, firm intention to lend money to Orion, and it specified the amount of the loan, the term of the loan, the interest rate and repayment terms, as well as the personal guarantor requirements for the loan and the pledge of the stock of the corporation as collateral for the loan. It further reflected that the bank was familiar with Zebulon Lee's broadcast background and with his business plans for the proposed facility. In this regard, the letter stated that "[b]ased on the need for another FM station and your extended experience in the industry, I am encouraged about the station's potential for success." The letter also makes it clear that the bank has discussed, and thus was aware of, Zebulon Lee's plan for the proposed facility when it extended the $300,000 commitment to Orion. In this respect, the letter notes, "[a]ccording to *our* discussions, the corporation would need up to $300,000" (emphasis added).

26. Moreover, the declaration of Zebulon C. Lee confirms that "[p]rior to asking the bank for that letter, we obtained cost figures for acquiring equipment and constructing the station." Declaration at 1. He states further that, before asking the bank for a $300,000 loan, "[Orion] prepared a budget of operating costs for the first three months.... added to those figures counsel's estimate of the hearing costs, ... interest on the anticipated bank loan and a substantial estimate for miscellaneous expenses." *Id.* at 1.

27. Willsyr, which has the burden of demonstrating that the record should be reopened, has proffered no evidence raising a substantial and material question of fact that the bank has not reviewed the Lees' qualifications, not found them satisfactory or otherwise belying Orion's claimed rea-

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[12] *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 27 (D.C. Cir. 1941). See, e.g., *Evergreen Broadcasting Company*, FCC 92-449 ¶ 10 (released Oct. 14, 1992), denying a late-filed petition to enlarge where the petitioner had specific notice of facts that it belatedly claimed required further hearings. See also *Scioto Broadcasters*, 5 FCC Rcd 5158, 5159 ¶ 9 (Rev. Bd. 1990), review denied, 6 FCC Rcd 1893 (1991), rejecting as procedurally deficient objections to the adequacy of a financial proposal that were not raised for two years.

[13] See, e.g., *Richardson Broadcast Group*, 7 FCC Rcd 1583, 1586 ¶ ¶ 15-16 (1992), in which we added a financial issue to explore questions raised by the applicant's bankruptcy filing, but did not question the bank's decision to extend a loan despite the applicant's bankruptcy petition. In contrast, the only question here is the continued availability of the bank loan, and that question is answered by the bank's July 1992 letter. Because the tax liens have been largely satisfied, there is no serious question that Orion will be legally compelled to use the $300,000 that the bank has promised to lend for the construction and operation of the proposed FM station to pay off those liens.

[14] *Scioto Broadcasters*, 5 FCC Rcd 5158, 5161 ¶ 13 (Rev. Bd. 1990).

sonable assurance of financing from First Union. Willsyr's bare assertions concerning the letter's adequacy does not warrant further inquiry.[15] It has not submitted, for example, a statement from a bank official indicating that the bank was unaware of the Lees' financial position when it issued the 1987 letter or otherwise undermining the bank's commitment to Orion. Nor does it suggest that the loan exceeds the bank's lending limit. In the absence of such evidence, there is no reason to infer from the bank's silence that it did not follow its usual practice and review the Lees' financial position before issuing the 1987 bank letter.[16]

28. Thus, we conclude that, as a matter of law, the bank's silence on these matters is insufficient, standing alone, to raise a substantial and material question as to Orion's financial qualifications. In other words, Willsyr has not raised a question of probable decisional significance and such substantial public interest importance or demonstrated a substantial likelihood of proving its potentially disqualifying allegations as to warrant reopening the record of its motions to enlarge issues. Its motions to reopen the record and to enlarge the issues are therefore denied.

II. PETITIONS FOR RECONSIDERATION

29. Having determined that there is no basis for reopening the record, we turn to the petitions for reconsideration. Section 1.106(b)(2) of the rules provides that where the Commission has denied an application for review, it will grant a petition for reconsideration only if it relies on facts relating to new or changed circumstances or on facts unknown to the petitioner since its last opportunity to present such matters to the Commission. By the same token, the Commission does not grant reconsideration for the purpose of debating matters on which it has already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1965), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965). Pursuant to section 1.106(b)(2), we deny the petitions for reconsideration filed by Willsyr, Skyland, Liberty, and BFBFM.

30. *Willsyr:* Willsyr urges that full credit is warranted for the proposed integration of its general partner, Sharan Harrison, because the post-formation record reflects that she has made all of the decisions. Willsyr claims that we have misconstrued the post-formation record, but it relies on arguments that we considered and rejected in affirming the Board's award of only 20% credit to Willsyr. We will not grant reconsideration for the purpose of debating matters that we have already considered.

31. In denying Willsyr's petition for reconsideration, we clarify the relevance of its limited partner's pre-formation involvement in assessing the integration proposal of Sharan Harrison under *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5601 ¶ 16 (1991). Willsyr deserves at most 20% quantitative integration credit for Harrison's integration proposal because the post-formation record does not conclusively demonstrate that she has *exclusive* managerial authority. Citing *Evergreen Broadcasting Company* and *Coast TV*, 6 FCC Rcd 2751 (1990), Willsyr urges, first, that a passive owner's pre-formation involvement lacks decisional significance if there are no impermissible post-formation activities, and, second, that full credit is warranted under *Evergreen* ¶ 12 unless the record demonstrates complete deference by the general partner to the limited partners.

32. However, Willsyr has misread those cases. The entire record, including any pre-formation activities by a nominally passive owner, is relevant under *Evergreen*, where the post-formation record "does not reliably demonstrate that the nominally active owners will exclusively control the ongoing business or leaves fundamental uncertainty about the applicant's control." *Id.* at 5601 ¶ 16. Moreover, partial credit is warranted where, as in this case, the post-formation record does not reflect that exclusive managerial authority rests with the nominally active owner(s) but that such authority is shared with the purportedly passive owners. Under those circumstances, we attribute for integration purposes the combined interests of the purportedly passive owners, thereby reducing the credit for the named general partner. If the record demonstrated complete deference by Harrison to the limited partners, Willsyr would be entitled to no comparative credit for her integration proposal.

33. Nor is there any merit to Willsyr's further claim that our treatment of its proposal cannot be squared with the award of 100% credit to Orion. According to Willsyr, we must discredit the integration proposal of Orion's Betty Lee because she had no role in prosecuting Orion's application. There is no requirement that an owner proposing to be integrated into station management must participate in prosecuting the application. Rather, such involvement is pertinent under *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ ¶ 9-10 (1989), in evaluating a two-tiered ownership proposal to determine whether the allegedly active owner(s) will exercise exclusive control over the applicant, will share such control with owners purporting to be passive, or will defer completely to them. Here, however, Orion is not a two-tiered entity with active and passive owners. Cf. *Rancho Mirage Radio*, FCC 92-304 (released July 9, 1992), in which we recognized that we are somewhat more lenient where the applicant does not propose a two-tiered ownership structure and there is no issue as to a nominally passive owner's authority over the applicant.

34. *Skyland:* Skyland also objects to our selection of Orion, urging that we erred in attributing its non-voting stockholders' equity interests based upon their service as local counsel. But it repeats arguments that we considered and rejected in awarding Skyland 20% credit for the proposed integration of its voting stockholder, Wanda Coleman. This is therefore not a basis for granting

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[15] Compare *Shawn Phalen*, 5 FCC Rcd 53, 54 (Rev. Bd. 1990) (remand ordered where additional document from lending institution and principals' own testimony raised substantial and material questions of fact as to financial qualifications); *Global Information Technologies*, 5 FCC Rcd 3385 (Rev. Bd. 1990) (remand where bank letter stated "although we have not reviewed the financial information required by us to fully consider a loan commitment, we are seriously interested in exploring" a potential loan).

[16] Attached to Willsyr's comments on the 1992 letter is deposition testimony of a First Union bank official in another case. The deposition reflects that it is the bank's practice not to issue "willingness to lend" letters without a detailed business plan, including cash flow projections, and substantial hard collateral outside of the start-up business. Without regard to the propriety of relying on deposition testimony in another case, that testimony makes no reference to Orion and it is not probative of whether they failed to follow their ordinary practice in making the 1987 loan commitment to Orion, which is not a start-up business given the Lees' existing broadcast operations.

reconsideration. In further support of its petition for reconsideration, Skyland requests that we hold this case in abeyance pending resolution of *Reexamination of the Policy Statement*, 7 FCC Rcd 2664 (1992), inasmuch as the selection of Orion turns on the integration criterion. In the alternative, Skyland has filed a motion for stay.

35. However, by its express terms, any revision in our comparative criteria policy adopted in *Reexamination* applies to "all applicants not in hearing as of the effective date of our action in this proceeding." *Id.* at 2669 ¶ 41. See also *Anchor Broadcasting Limited Partnership*, FCC 92-300 (adopted July 1, 1992), in which we reaffirmed the validity of our integration policy in light of regulatory developments that were alleged in *Bechtel v. FCC*, 956 F.2d 873 (D.C. Cir. 1992) to have eviscerated the rationale for that policy. Thus, *Reexamination* is not a basis for granting reconsideration, holding this proceeding in abeyance, or for granting Skyland's motion for stay.

36. *Liberty:* In its petition for reconsideration, Liberty challenges its disqualification on the transmitter site issue. It argues, as it did in its application for review, that the Board overlooked the testimony of Tim Warner, which allegedly corroborates the claim that Vicky Utter orally agreed to lease the site to Liberty's principal, Valerie Klemmer. In so arguing, Liberty concedes that it does not rely on new facts or newly discovered evidence, as required by section 1.106(b)(2). Nonetheless, it claims that reconsideration would serve the public interest because the Commission did not address decisionally significant issues raised in its application for review. That we denied Liberty's application for review concerning the Board's determinations, 6 FCC Rcd at 1979 ¶ ¶ 10-12, "without specifying reasons," as permitted by 47 C.F.R. § 1.115(g) of the rules, is not a basis for granting reconsideration for the purpose of again debating matters that we already considered and rejected without comment in denying the application for review.

37. *BFBFM:* We likewise deny BFBFM's petition for reconsideration. It objects to our determination that BFBFM lacked due diligence in waiting at least six months after it learned of the sale of its original site to submit a site amendment.[17] It urges that reconsideration is warranted because "the rejection of that amendment on diligence grounds is contrary to *Marin TV v. FCC*, 936 F.2d 1304 (D.C. Cir. 1991), which was decided after the last opportunity to file pleadings in this case. However, the court in *Marin* simply affirmed the Commission's acceptance of the site amendment,[18] and that acceptance predated the filing of applications for review in this case. *Marin* is therefore not a basis for granting reconsideration.

38. In any event, the two cases are distinguishable. In *Marin*, we upheld the ALJ's determination that the applicant had no reason to amend to a new site until the specification of a city grade coverage issue against it. In so doing, we did not modify the established standard for measuring due diligence (i.e., from the time that the applicant knew, or should have known, of the problem requiring amendment). Rather, we relied on the fact that, upon learning of a possible city-grade coverage deficiency, the *Marin* applicant had conducted its own engineering studies, and those studies indicated that the coverage from its proposed site would be adequate. In view of these studies, it had no reason to know of the problem (and of the need for an amendment) until an issue was specified against it.

39. In contrast, BFBFM learned that its site had been sold in August 1988 but it did not take steps to confirm the continued availability of the site or amend to a new site for at least 6 months. In the interim, BFBFM did nothing to assure the continued availability of its site, despite the sale of the property. Although BFBFM sought to present evidence that its option to lease the site was enforceable against the new owner, the record does not reflect that it took any steps to enforce that option against the new owner of the site.[19] Thus, BFBFM did not satisfactorily address the problem concerning its site in an expeditious manner, as the applicant in Marin had done.[20] Except for alleging that the current owner lives outside of Biltmore Forest, BFBFM offers no explanation for this delay. *Marin* does not sanction such unexplained delay, and such delay would be contrary to our recent efforts to expedite service to the public.[21]

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[17] Notwithstanding BFBFM's suggestion, we thoroughly considered the site issue in denying its application for review, even though we noted that it could not prevail on the comparative issue. BFBFM claims that, given the pending petitions to enlarge issues against Orion, the comparative issue is closer and that reconsideration is therefore warranted. We disagree. BFBFM claims that Skyland and Willsyr deserve no integration credit, but we have already considered questions relating to their integration proposals in selecting Orion as the comparative winner. We will not grant reconsideration to revisit these arguments.

[18] *Magdalene Gunden Partnership*, 2 FCC Rcd 1223, 1234-36 (I.D. 1987), affirmed, 2 FCC Rcd 5513, 5514 (Rev. Bd. 1987), recon. denied, 3 FCC Rcd 488, 489-90 (Rev. Bd. 1990).

[19] BFBFM faults us for requiring it to litigate the enforceability of the option. However, it has misread our decision below. In affirming BFBFM's disqualification on the site issue, we held only that upon learning of the sale of the site, it had a choice: It could either rely on the option agreement with the initial owner, and take legal action to enforce that agreement against the new owner, or expeditiously seek a new site. It was not entitled to have it both ways. If it was unwilling to enforce the option, it was not entitled to assume that the site would be available.

[20] BFBFM submits that we erred in relying on extra-record evidence concerning its option agreement with the initial owner. However, we properly relied on the absence of any evidence in the record that BFBFM had recorded, or sought to legally enforce, its option with the original landowner. That BFBFM recorded the option that it eventually secured from the owner of the second site has no bearing upon its diligence in waiting at least 6 months, after learning of the sale of its initial site, before amending to a new site.

[21] See, e.g., *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134-35 n.7 (1985). See also *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991), review denied, 7 FCC Rcd 3237 (1992), disallowing a site amendment submitted well before the start of the evidentiary hearings but ten months after the applicant discovered the short-spacing; *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 164 ¶ 53 (1991); *California Broadcasting*, 90 FCC 2d at 808 ¶ 19, indicating that, in the absence of unusual circumstances, a delay of more than six months in submitting a site amendment does not constitute due diligence; *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1328 (1978) (six month delay in filing a site amendment held not to constitute due diligence, given the applicant's continued reliance on a site that he knew was unavailable).

III. ORDERS

40. ACCORDINGLY, IT IS ORDERED, That the motion for stay, filed on March 30, 1992 by Skyland Broadcasting Company, IS DENIED; and that the petitions for reconsideration, filed on March 27, 1992 by Liberty Productions Limited Partnership, and on March 30, 1992 by Skyland Broadcasting Company, Biltmore Forest Broadcasting FM, and Willsyr Communications, Limited Partnership ARE DENIED.

41. IT IS FURTHER ORDERED, That the Motion to Reopen the Record and to Enlarge the Issues, filed on April 3, 1992 by Willsyr Communications, Limited Partnership, and the Further Motion to Reopen the Record and to Enlarge the Issues, filed on April 24, 1992 by Willsyr Communications, Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-580

In re Applications of

SAFE BROADCASTING CORPORATION — File No. BPH-871022MC

TRI-STATE BROADCASTING COMPANY — File No. BPH-871023MJ

For Construction Permit for a
New FM Station on Channel 239A
in Trion, Georgia

ORDER

Adopted: November 10, 1992; Released: November 20, 1992

By the Commission:

1. Before the Commission for consideration is a Petition for Reconsideration of a Commission Memorandum Opinion and Order affirming a Review Board decision granting the application of Tri-State Broadcasting Company (Tri-State) for a new FM station in Trion, Georgia based on its superior integration proposal.[1] *Safe Broadcasting Corporation*, 7 FCC Rcd 3440 (1992).

2. Safe Broadcasting Corporation (Safe) bases its petition for reconsideration on what it perceives to be the failure of the Commission to address Safe's arguments that Tri-State failed to comply with the Commission's "public inspection file" rule, 47 C.F.R. § 73.3526, and that the rejection of Safe's threshold showing for past programming was unwarranted. We reject both of Safe's contentions.

3. First, Safe's argument that because the Commission did not specifically address the issue relating to Tri-State's compliance with Section 73.3526 the matter is unresolved, is wrong. The Board conducted a *de novo* review of the record and based its rejection of Safe's arguments on a thorough discussion of the public inspection file issue as raised by Safe's exceptions. *Safe Broadcasting Corporation*, 6 FCC Rcd 6548, 6550 ¶ ¶ 9-11 (Rev. Bd. 1991). It was in this context that we stated, "We agree with the Board's resolution of this case." *Safe Broadcasting Corporation*, 7 FCC Rcd at 3440 ¶ 3. By affirming the Board, we determined that the arguments raised in Safe's application for review had been adequately addressed and resolved. Thus, no further consideration was warranted. *See Channel 32 Broadcasting Company*, 7 FCC Rcd 1694 at ¶ 4 (1992), where we stated that we need not discuss each and every allegation contained in an application for review, and that those matters argued but not specifically addressed are deemed to have been adequately considered by the Board.

4. Second, Safe misinterprets the Commission's action, above, as condoning the practice of the repeated use of the same issues/programs list in a station's public inspection file each quarter, *without regard to the ongoing relevancy or accuracy of the contents*. The ALJ found that the reasons for the similarity of the issues on the lists had been adequately explained and there was no evidence that Tri-State manufactured its issues/programs lists or other public file materials after the fact. 6 FCC Rcd at 5228-30 ¶ ¶ 10, 22 and 25-26. Thus, there is no basis for Safe's argument that the Commission has condoned a practice of placing issues/programs lists in the public inspection file without regard to their relevancy or accuracy.

5. Furthermore, the ALJ found that even if Tri-State's practice of filing identical significant issue lists over a period of time were found to be deficient under Section 73.3526, "Tri-State acted at all times in good faith." 6 FCC Rcd at 5229 ¶ 23. The Commission does not consider mere technical non-compliance with the public file rules to raise a substantial and material question as to the licensee's basic qualifications. *See Arkansas Educational Television Commission*, 6 FCC Rcd 478, 481 ¶ 13 (1991), where we conditioned renewal on timely compliance with Section 73.3526; and *Philadelphia Area Television Renewals*, 5 FCC Rcd 3847, 3850 ¶ 23 (1990), where we found that failure to place an issues/programs list in the station's public inspection file for over a year did not warrant an evidentiary hearing. Thus, further consideration of this matter is not warranted.

6. Safe's further plea for "clarification by the Commission whether a licensee may comply with the Commission's public inspection file rule" in the manner employed by Tri-State, as well as Safe's demand that the Commission overturn the rejection of Safe's threshold past programming showing, are essentially requests that the Commission reconsider its decision based on the arguments previously advanced by Safe in its application for review. It is well established that the Commission does not grant reconsideration to debate matters on which the Commission has already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). See also 47 C.F.R. § 1.106(b)(2), which states that, where the Commission has denied an application for review, it will entertain a petition for reconsideration only if the petition relies on facts relating to new or changed circumstances or on facts unknown to the petitioner since the last opportunity to present such matters. As Safe's petition for reconsideration does not rely on new or newly discovered matters, nor has Safe demonstrated any other reason warranting further consideration, it is denied.

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.106(b)(2), the Petition for Reconsideration filed July 6, 1992 by Safe Broadcasting Corporation IS DENIED.

[1] Now before the Commission is a Petition for Reconsideration filed July 6, 1992, by Safe Broadcasting Corporation and an Opposition filed July 20, 1992, by Tri-State Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Belwen, Inc. File No. 1593-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution Service
station on the E-group channels
at Hagerstown, Maryland

ORDER ON RECONSIDERATION

Adopted: November 13, 1992; Released: November 20, 1992

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of Belwen, Inc. to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Hagerstown, Maryland and for reinstatement of the application.

I. BACKGROUND AND CONTENTIONS

2. As a result of a Commission lottery, Belwen's application was selected for qualification review. Subsequently, a qualification review of this application was conducted by Division staff pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. Sec. 21.32. Upon examination, this application was found to contain several deficiencies that precluded the staff from making a finding that Belwen was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of the application would serve the public interest. Belwen was notified of these deficiencies by letter and was provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In this deficiency letter, Belwen was also advised that failure to file the requested information within thirty days of December 3, 1986 could result in the dismissal of its application.

3. Belwen provided some, but not all, of the information necessary to complete processing of its application. However, Belwen failed to submit the requested signed lease or lease option agreement, a list of program input equipment, or the Section 21.902(i) interference analysis.

4. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d) of the Commission's Rules, 47 C.F.R. Sec. 21.13(c), 21.20(d), and 21.28(d), and by letter dated almost two years after the deficiency letter, the Division dismissed Belwen's application for failure to comply in a timely manner with the Division's request for information.

5. On September 6, 1988, Belwen filed the instant petition for reconsideration of the Division's dismissal action. Belwen maintained that reinstatement of the application would be in the public interest because: (1) the applicant only needed to provide "reasonable assurance" that the proposed site will be available for its intended use; (2) Belwen had contacted the owner of the property proposed as its transmitter site, and a lease option agreement would be forwarded to the Commission upon execution; (3) Belwen had specified in its original application the equipment to be utilized at its station, in Exhibit J; and (4) the applicant had already addressed the requirements of Section 21.902(i) in its response to the deficiency letter, by indicating that providing a non-interference analysis would be expensive, time-consuming, and premature while its application was still subject to Commission review.[2]

II. DISCUSSION

6. As of the date of the Division's dismissal action, Belwen still had not submitted the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Belwen had not complied with the request to submit a Section 21.902(i) interference analysis. At the time of dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving a construction authorization and at such time as the Commission requests, an analysis demonstrating that the proposed MMDS facilities will not cause harmful interference to existing co-channel or adjacent channel Instructional Television Fixed Service (ITFS) receiver locations within 50 miles of the MMDS transmitter, or alternatively, an "interference-acceptance" statement from the affected ITFS licensee. Despite the specific request that this analysis be submitted, Belwen failed to submit the required analysis.[3] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

7. In addition, Belwen failed to submit a requested list of program input facilities prior to dismissal. Also, Belwen failed to submit a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required pursuant to 47 C.F.R. Sec. 21.15(a). For MMDS applicants subject to the Commission's lottery proceedings, the Commission decided that

[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) ground elevation of the antenna structure, along with a copy of the FAA study for the proposed structure, pursuant to 47 C.F.R. Secs. 21.15(c) and (d); (3) current financial data, pursuant to 47 C.F.R. Sec. 21.17(b); (4) a list of equipment for program input facilities, pursuant to FCC Form 435 item 17(c) and 47 C.F.R. Sec. 21.13(c); (5) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (6) the agreement with a non-applicant regarding control of the station pursuant to FCC Form 435 item 25(b) and 47 C.F.R. Sec. 21.14(f); and (7) a 47 C.F.R. Sec. 21.902(i) interference analysis.

[2] Belwen also filed a request for a stay of a new lottery for the E-group channels in Hagerstown, Maryland during the pendency of its reconsideration petition.

[3] Belwen stated in its petition for reconsideration that it intended to submit a non-interference analysis at some unspecified future date. As of the date of this order, no analysis has been submitted.

a demonstration of reasonable assurance of site availability would be sufficient prior to a lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted. *Revision of Part 21 of The Commission's Rules*, 1 FCC Rcd 5713, 5721 (1987)("A license will not be granted ... until concrete evidence of site availability is submitted.")[4]

8. Belwen requested and received a 30-day extension of time to submit curative amendments in response to the deficiency letter. Its failure to submit curative amendments for almost two years substantially impeded the expeditious offering of MMDS at Hagerstown. Also, Belwen's failure to respond in a timely fashion to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communications Act. *By Direction of the Commission Letter to U.S. West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal and even as late as the deadline for filing a petition for reconsideration, Belwen had not provided the Section 21.902(i) interference analysis. The staff, therefore, was not in a position to complete evaluation of Belwen's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990). In view of the foregoing, dismissal of Belwen's application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.[5]

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Belwen, Inc. regarding its Hagerstown, Maryland MMDS application IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] In response to deficiency letters, Belwen submitted an exhibit which vaguely described the facilities it intended to use at the proposed station, but which failed to list or specify the equipment to be used for program input. Belwen was required, Section 21.13(c), to submit a list of program input facilities after the Division directed it to do so. Section 21.13(c) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application, ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...." We observe that Belwen, on reconsideration, submitted a list specifying the program input facilities to be used at the proposed station, more than two years after the information was requested.

[5] Due to our disposition of Belwen's reconsideration petition, Belwen's request for stay is hereby dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Belwen, Inc. File No. 1647-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution
Service station on the
E-group channels at
Poughkeepsie, New York

ORDER ON RECONSIDERATION

Adopted: November 13, 1992; Released: November 20, 1992

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of Belwen, Inc. to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Poughkeepsie, New York and for reinstatement of the application. For the following reasons, we deny the reinstatement request.

I. BACKGROUND AND CONTENTIONS

2. As the result of a Commission lottery, Belwen's application was selected for qualification review. Subsequently, a qualification review of the application was conducted by the Division staff, pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. §21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Belwen was legally, technically, financially, and otherwise qualified to be a licensee, and that grant of the application would serve the public interest. By letter Belwen was notified of the deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Belwen was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Belwen responded to some, but not all of the deficiencies. Belwen did not submit the requested signed lease or lease option agreement, a current financial qualification demonstration, or the Sec. 21.902(i) interference analysis.

4. By letter dated January 25, 1989, and more than two years after the deficiency letter, the Division dismissed Belwen's application for failure to comply in a timely manner with the Division's request for information. 47 C.F.R. Sec. 21.13(c), 21.20(d), and 21.28(d).

5. On March 13, 1989, Belwen filed the instant petition for reconsideration of the Division's dismissal action. Belwen maintains reinstatement of the application is in the public interest because: (1) in its response to the Division's deficiency letter, Belwen indicated that its proposed antenna site was available as of that date, and that negotiations to obtain an option on the site were underway; and (2) Belwen should not have been requested to submit an "expensive, time-consuming and premature" non-interference analysis to comply with the requirements of 47 C.F.R. §21.902(i).

II. DISCUSSION

6. As of the date of the Division's dismissal action, Belwen still had not submitted the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Belwen had not submitted a Section 21.902(i) interference analysis. At the time of dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving a construction authorization and at such time as the Commission requests, an analysis demonstrating that the proposed MMDS facilities will not cause harmful interference to existing co-channel or adjacent channel Instructional Television Fixed Service (ITFS) receiver locations within 50 miles of the MMDS transmitter, or alternatively, an "interference-acceptance" statement from the affected ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request for this analysis, Belwen failed to submit the required analysis. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

7. In addition, Belwen failed to submit the requested current financial qualification information prior to dismissal.[2] Also, Belwen did not submit a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a), 27 C.F.R. 21.15(a). For MMDS applications subject to the Commission's lottery proceedings, the Commission decided that a demonstration of reasonable assurance of site availability would be sufficient prior to a lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete "evidence of site availability must be submitted. *Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987)("A license will not be granted . . . until concrete evidence of site availability is submitted.")[3]

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[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) correct antenna structure height information, pursuant to 47 C.F.R. Sec. 21.15(c); (3) current financial data, pursuant to 47 C.F.R. Sec. 21.17(b); (4) the agreement with a non-applicant regarding control of the station pursuant to FCC Form 435 item 25(b) and 47 C.F.R. Sec. 21.15(f); and (5) an interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] In an amendment to its petition for reconsideration, Belwen submitted a statement which certified its "reasonable assurance" of its financial ability. However, the statement did not provide current financial data as was specifically requested by the Division. Belwen was required, pursuant to Section 21.13(c), to submit *current* information for qualification review purposes.

[3] In its petition for reconsideration, Belwen stated that it "certainly understood that its application would not be granted unless and until it submitted an option to lease or a lease, ..." but that Belwen was concerned about other unspecified "drastic action." In a June 2, 1989 amendment to its petition for reconsideration, more than two years after the information was re-

8. Belwen had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than two years substantially impeded the expeditious offering of MMDS at Poughkeepsie. Also, Belwen's failure to respond in a timely fashion to the Division's information requests hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communications Act. *By Direction of the Commission Letter to U.S. West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal and even as late as the deadline for filing its petition for reconsideration, Belwen had not provided the Section 21.902(i) interference analysis, the required financial certification, and a lease or lease option agreement. The staff, therefore, was not in a position to complete evaluation of Belwen's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990). In view of the foregoing, dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Belwen, Inc. regarding its Poughkeepsie, New York MMDS application IS DENIED.

FEDERAL COMMUNICATION COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

quested, Belwen submitted a lease option agreement. However, the option was for a site different from the one proposed in Belwen's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

Broadcast Data Corporation — File No. 2158-CM-P-83 and 2268-CM-P-83

For Authority to Construct and Operate Multichannel Multipoint Distribution Service stations on the F-group channels at Greenville, North Carolina and Portland, Maine

ORDER ON RECONSIDERATION

Adopted: November 13, 1992; Released: November 20, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Broadcast Data Corporation (Broadcast) filed a petition for reconsideration of the dismissals by the Domestic Facilities Division (Division) on delegated authority of its applications for authority to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels at Greenville, North Carolina and Portland, Maine, and requested reinstatement of its applications.

2. *Background.* As the result of Commission lotteries, the above-referenced applications were selected for qualification review. Subsequently, Division staff initiated a qualification review of each application pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the applications were found to contain several deficiencies that precluded the staff from making a finding that Broadcast was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of each of its applications would serve the public interest. Broadcast was notified by separate letters of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of each letter.[1] Broadcast was also advised in each deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.[2]

3. After two extensions of time, Broadcast provided some, but not all, of the requested information for both of these applications. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the rules, the Division denied Broadcast's third extension request and dismissed the applications for failure to comply completely in a timely manner with the Division's requests for information. On reconsideration, Broadcast argues that these applications should be reinstated because: (1) it had spend effort and money to provide some of the requested information, (2) the Commission should have granted its requests for a third extension of time as 47 C.F.R. Sec. 1.46(a) is contradicted by a practice of granting extensions liberally to MMDS applicants,[3] and (3) MMDS application dismissal should only be done upon a uniform period of time after the deficiency letter.

4. *Discussion.* As of the date of the Division's dismissal actions, in each instance more than four months after the Division's requests for information, Broadcast still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. Broadcast had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a).[4] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement, or other concrete evidence of site availability must be submitted.[5] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. While we do agree that it would have been more uniform to mail all MMDS applicants a deficiency letter on the same day, and later to dismiss all MMDS applications on the same day, the limited staff and resources available for MMDS processing preclude such a practice. Therefore, MMDS applications were dismissed at various lengths of time after the dates of the deficiency letters. In *Radio Telephone Service*, 63 FCC 2d 1126 (1977), the Commission stated with regard to a Part 21 applicant that by "waiting close to six weeks beyond the deadline for a reply, the Bureau was more than lenient toward [the dismissed applicant] and quite justified in invoking Section 21.28(c)." Specifically with regard to the processing of MDS applica-

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[1] The deficiencies cited in the letter concerning Broadcast's Greenville application were the absence of: (1) correct ground elevation for antenna structure, pursuant to 47 C.F.R. Sec. 21.15(c); (2) financial certification, pursuant to 47 C.F.R. Sec. 21.17; (3) emergency repair procedures and maintenance program information, pursuant to 47 C.F.R. Sec. 21.15(e); (4) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i); and (5) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a). Except for the correct ground elevation data, the same deficiencies were cited in the letter concerning Broadcast's Portland application.

[2] Second deficiency letters sent to Broadcast also contained dismissal warnings.

[3] Section 1.46(a) states that extensions of time will not be routinely granted.

[4] Even if Broadcast was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or option agreement after the Division requested this information. Section 21.13(a) provides, *inter alia*,: "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[5] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.)*

tions, the Common Carrier Bureau found that application processing should not be delayed awaiting applicants to cure application deficiencies. *Digital Paging Systems, Inc.*, 2 FCC Rcd 1523, 1524 (1987).

6. Broadcast had a duty to submit curative amendments for each of its applications within thirty days of the Division's written requests, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failures to submit curative amendments for more than four months substantially impeded the expeditious offering of MMDS at Greenville and Portland. *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Also, Broadcast's failure to respond in a timely manner to the Division's requests for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissals, Broadcast had not provided the required leases or options. The Division was not in a position, therefore, to complete evaluation of Broadcast's MMDS station proposals and its qualifications to be an MMDS licensee. *Multi Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion and Ordering Clause.* Having carefully considered all of the arguments and evidence presented, we find that the dismissals of these applications for failure to comply with the Division's requests for information was proper, reconsideration of those actions is not warranted, and reinstatement of the applications is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Broadcast Data Corporation regarding the above-referenced MMDS applications IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

MWTV, Inc. File No. 10245-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution
Service station on the F-group
channels at Baton Rouge, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 1992; Released: November 20, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of MWTV, Inc. to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Baton Rouge, Louisiana was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) and Daniels MDS Company (Daniels) filed post-lottery petitions to deny challenging the application. MWTV filed a reply.

2. *Petitions to Deny.* In their petitions, the Committee and Daniels allege that MWTV, together with fifteen other MMDS applicants, engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names. All sixteen of these applicants filed applications for Baton Rouge.[1] The Committee contends that the events leading up to the filing of these "cookie-cutter" applications,[2] the familial or business relationships among certain applicants,[3] the preparation of the applications under the direction and at the expense of Bruce Merrill, acting through his wholly-owned company, Merrill Communications, and the similarities in technical and other information among the applications, and the Letter of Understanding between MWTV and Merrill Communications,[4] should lead the Commission to conclude that MWTV failed to disclose the identity of the real-party-in-interest to its application in violation of 47 C.F.R. Sec. 21.13(a).[5] In addition, the Committee contends that multiple applications were filed in violation of Section 21.901(d)(2),[6] also known as the one-to-a-market rule.[7] The Committee alsocontends that MWTV failed to disclose its affiliation or relationship to its intended or likely subscriber, Merrill Communications, in violation of Sec. 21.900 of the rules.

3. *Reply.* MWTV argues:

> To the extent the Committee's Boston Petition may have raised any serious questions regarding Bruce Merrill's relationship to each applicant, the Boston Reply and accompanying affidavits eliminated all *material* and *substantial questions* of fact. In short, there are no more relevant facts yet to be determined, and

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[1] These sixteen MMDS applicants are: B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corporation, Line of Site, Inc., Mettler Communications, Inc., Microwave Video, Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc., and Wireless Services, Inc.

[2] The Committee asserts that Bruce Merrill "arranged for the filing of applications by his employee and having assisted Marshall Carpenter in obtaining financial assurances, Bruce Merrill proceeded to outfit MWTV with MMDS applications for numerous markets," and even arranged for MWTV's incorporation. Committee Petition at 18. "Merrill Communications appears to have controlled the selection of markets for which MWTV filed." *Id.* at 19.

[3] Marshall Carpenter was an employee of Merrill Communications, Inc. at the time the MMDS applications of MWTV were filed. Marshall Carpenter is the president, one of two directors and 50% stockholder of MWTV.

[4] This Letter of Understanding states that Bruce Merrill, through his company, Merrill Communications, will provide programming services to MWTV, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Merrill Communications.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. Sec. 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application. The test for determining whether a person is a real-party-in-interest is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974); *see KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub. nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987).

[6] The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications. At the time the above-referenced MMDS application was filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

See, e.g., David Laustsen and Broadcast Data Corp., 3 FCC Rcd 2053 (Comm. Car. Bur. 1988).

[7] The Committee argues that Bruce Merrill or Merrill Communications as an undisclosed real-party-in-interest was the applicant in more than one MMDS application in Baton Rouge. If true, there would exist violations of both the one-to-a-market and real-party-in-interest rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053, 2054 (Comm. Car. Bur. 1988).

> the facts disclosed do not support any of the legal theories contained in the Committee's Boston Petition, or its subsequent petitions, and the instant petition.

MWTV's Reply at 12 (emphasis in original).

4. *Discussion.* The allegations by the Committee concerning violations of the real-party-in-interest and one-to-a-market rules are not unique to this particular MWTV application. These allegations, as applied to MWTV, were considered and rejected by the Commission in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987)(hereinafter cited as *VCI)*. In light of MWTV's rebuttal and for the reasons provided in *VCI,* we find the Committee's and Daniels' unsubstantiated evidence insufficient to establish the existence of real-party-in-interest and one-to-a-market rule violations.[8]

5. The Committee also alleges that MWTV violated the non-affiliation provision of Section 21.900 because it failed to submit a statement disclosing the affiliation or relationship between MWTV and Merrill Communications, its intended or likely subscriber. "Merrill Communications and MWTV are affiliated as MWTV is managed, directed, and owned by Marshall Carpenter who, at the time he applied for MMDS licenses, was an employee of Merrill Communications." Committee Petition at 38. We note that MWTV's application disclosed that its intended customer-programmer was Merrill Communications. By the terms of Section 21.900, MWTV had a duty to disclose any affiliation or relationship between MWTV and Merrill Communications. The terms "affiliation or relationship" have been defined for purposes of Section 21.900 as any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship. *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service,* 45 FCC 2d 616, 618 (1974). The admitted relationship between MWTV and Merrill Communications was a financial or business relationship. However, MWTV failed to disclose in its initial application its affiliation or relationship with Merrill Communications, thereby violating Section 21.900. For violation of Section 21.900, we determine that a condition will be imposed on any MMDS authorization MWTV obtains for Baton Rouge. This condition will require that MWTV may not provide service to Bruce Merrill, Merrill Communications, or any entity in which Bruce Merrill is affiliated.[9]

6. *Conclusion and Ordering Clauses.* Having carefully considered all the pleadings and the evidence submitted by the parties, we find that the allegations raised by the Committee and Daniels, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petitions to Deny filed by The Committee for Fair MDS Lotteries and Daniels MDS Company ARE HEREBY DENIED. IT IS FURTHER ORDERED that any MMDS authorization MWTV obtains for Baton Rouge MUST BE CONDITIONED that MWTV may not provide service to Bruce Merrill, Merrill Communications, or any entity in which Bruce Merrill is affiliated.

7. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[8] *See, e.g., Astroline Communications Co. v. FCC,* 857 F.2d 1556, 1536, 1573 (D.C.Cir. 1988)(hereinafter cited as *Astroline)*; *Beaumont Branch of the NAACP v. FCC,* 854 F.2d 501 (D.C. Cir. 1988) (hereinafter cited as *Beaumont)*; *Gencom, Inc. v. FCC,* 832 F.2d 171 (D.C.Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 394, 397 (D.C.Cir. 1985); *see also, Virginia Communications, Inc.,* 2 FCC Rcd 1895 (1987); *Sherry Rullman and Edna Cornaggia,* 2 FCC Rcd 2011 (1987); *Midland Educational Broadcasting Foundation,* 4 FCC Rcd 5207 (Audio Serv. Div. 1989). We note that the Committee failed to submit an affidavit to support its allegations pursuant to 47 C.F.R. Sec. 309(d)(1). *Astroline,* 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont,* 854 F.2d at 507.

[9] We remind MWTV that the condition imposed by the Commission in *VCI,* 2 FCC Rcd 1900, remains applicable to any MMDS authorization issued to it.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Microwave Video Services, Inc. — File No. 9006-CM-P-83 and 9084-CM-P-83

For Authority to Construct and Operate Multichannel Multipoint Distribution Service stations on the E-group channels at Modesto, California and Youngstown, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 1992; Released: November 20, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced applications of Microwave Video Services, Inc. (Microwave) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Modesto, California and Youngstown, Ohio were selected for qualification review as the result of Commission lotteries. The Committee for Fair MDS Lotteries (Committee) filed post-lottery Petitions to Deny challenging each application. Continental Cablevision of California, Inc. (Continental) filed a petition to deny the Modesto application.

2. *Joint Allegations.* In their Petitions, the Committee and Continental allege that Microwave, together with fifteen other MMDS applicants, engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names.[1] All sixteen of these applicants filed applications for Modesto and Youngstown.[2] The Committee contends that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial[4] or business relationships among certain applicants,[5] the preparation of the applications under the direction and at the expense of Merrill Communications, and the similarities in technical and other information among the applications, and the Letter of Understanding between Microwave and Merrill Communications,[6] should lead the Commission to conclude that Microwave failed to disclose the identity of the real-party-in-interest to its application in violation of 47 C.F.R. Sec. 21.13(a).[7] In addition, the Committee contends that multiple applications were filed in violation of Section 21.901(d)(2),[8] also known as the one-to-a-market rule.[9] The allegations by the Committee and Continental concerning violations of the real-party-in-interest and one-to-a-market rules are not unique to these particular Microwave applications. These allegations, as applied to Microwave, were considered and rejected by the

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[1] The Committee incorporated by reference the pleadings it filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987)(hereinafter cited as *VCI*) and against Microwave's Greenville application.

[2] These sixteen MMDS applicants are: B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corporation, Line of Site, Inc., Mettler Communications, Inc., Microwave Video, Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc., and Wireless Services, Inc.

[3] The Committee asserts that Bruce Merrill "recruited his son to file applications and ... provided Microwave Video with the financial assurances it now relies on." Committee's Youngstown Petition at 6. The Committee also argues that "Microwave Video admitted that Bruce Merrill ... prepared and paid for the over 205 MMDS applications filed by Microwave Video." Committee's Modesto Petition at 5-6.

[4] Bruce Merrill is the father of Philip Merrill, the president, a director and 50% stockholder of Microwave.

[5] Philip Merrill was the vice president of Merrill Communications, Inc. and the president of Microwave at the time the MMDS applications of Microwave were filed.

[6] This Letter of Understanding states that Bruce Merrill, through his company, Merrill Communications, will provide programming services to Microwave, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Merrill Communications.

[7] Section 21.13(a) of the Commission's Rules, 47 C.F.R. Sec. 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application. The test for determining whether a person is a real-party-in-interest is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974); *see KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub. nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987).

[8] The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications. At the time Microwave's MMDS applications were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

See, e.g., David Laustsen and Broadcast Data Corp., 3 FCC Rcd 2053 (Comm. Car. Bur. 1988).

[9] The Committee argues that Bruce Merrill or Merrill Communications as an undisclosed real-party-in-interest was the applicant in more than one MMDS application in Modesto and Youngstown. If true, there would exist violations of both the one-to-a-market and real-party-in-interest rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053, 2054 (Comm. Car. Bur. 1988).

Commission in *VCI*. For the reasons provided in *VCI*, we find the Committee's and Continental's unsubstantiated evidence insufficient to establish the existence of real-party-in-interest and one-to-a-market rule violations.[10]

3. *Committee's Section 21.900 Allegation.* The Committee also contends that Microwave failed to submit a statement disclosing its affiliation or relationship to its intended or likely subscriber, Merrill Communications, in violation of Section 21.900 of the rules. "The Letter of Understanding clearly evidences that Merrill Communications is an *'intended or likely'* subscriber or program originator for Microwave Video's facilities. Merrill Communications and Microwave Video are affiliated as Microwave Video is managed, directed and 50% owned by Philip Merrill, an officer of Merrill Communications." Committee's Youngstown Petition at 8-9 (emphasis in original). At the time Microwave's MMDS applications were filed, Philip Merrill was the President of Microwave and the Vice President of Merrill Communications. We note that Microwave's application disclosed that its intended subscriber was Merrill Communications. However, Microwave failed to disclose at that time that there was an affiliation or relationship between Microwave and Merrill Communications. By the terms of Section 21.900, Microwave had a duty to disclose any affiliation or relationship between Microwave and Merrill Communications. The terms "affiliation or relationship" have been defined for purposes of Section 21.900 as any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, except the carrier-user relationship. *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 618 (1974). The admitted relationship between Microwave and Merrill Communications was a financial or business relationship. However, Microwave failed to disclose this affiliation or relationship in its initial application, thereby clearly violating Section 21.900. Consequently, for violation of Section 21.900, we determine that a condition will be imposed on any MMDS authorization Microwave obtains for Modesto or Youngstown. This condition will require that Microwave may not provide service to Bruce Merrill, Merrill Communications, or any entity in which Bruce Merrill is affiliated.[11]

4. *Conclusion.* Having carefully considered all the pleadings and the evidence submitted by the parties, we find that the allegations raised by the Committee and Continental, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petitions to Deny filed by The Committee for Fair MDS Lotteries and Continental Cablevision of California, Inc. ARE HEREBY DENIED. IT IS FURTHER ORDERED that any MMDS authorization Microwave obtains for Modesto or Youngstown MUST BE CONDITIONED that the licensee may not provide service to Bruce Merrill, Merrill Communications, or any entity in which Bruce Merrill is affiliated.

5. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[10] *See, e.g., Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1536, 1573 (D.C.Cir. 1988)(hereinafter cited as *Astroline)*; *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (hereinafter cited as *Beaumont)*; *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394, 397 (D.C.Cir. 1985); *see also, Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987). We note that the Committee and Continental failed to submit an affidavit to support its allegations pursuant to 47 C.F.R. Sec. 309(d)(1). *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont*, 854 F.2d at 507.

[11] We remind Microwave of the condition imposed by the Commission in *VCI*, 2 FCC Rcd 1900, which remains applicable to any MMDS authorization issued to it.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-594

In the Matter of

Amendment of Section 73.202(b),	RM-7250
Table of Allotments,	RM-7660
FM Broadcast Stations.	
(Oakdale and Campti, Louisiana)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 21, 1992; Released: November 23, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order* in this proceeding, 7 FCC Rcd 1033 (1992), filed on behalf of B&D Communications, Inc. ("B&D"),[1] which granted a mutually exclusive counterproposal filed by Campti Broadcasting Company ("CBC") to allot Channel 253C3 to Campti, Louisiana, as that community's first local aural transmission service. The *Report and Order* denied B&D's petition requesting a substitution of Channel 254C1 for Channel 254C2 at Oakdale, Louisiana. No opposition was filed in response to B&D's petition for reconsideration.

2. *Background.* Oakdale Limited Partnership ("OLP"), predecessor in interest to B&D, initially requested the substitution of Channel 254C1 for Channel 254C2, in reply comments to MM Docket No. 89-447, which proposed a substitution of Channel 235C3 for Channel 222A at Coushatta, Louisiana. *See* 4 FCC Rcd 7481 (1989). In order to facilitate the non-adjacent substitution, the Coushatta proponent stated that Channel 253C3 was available to accommodate any additional expressions of interest. OLP filed an objection to the use of 253C3 at Coushatta, proposing instead the substitution of Channel 254C1 for Channel 254C2 at Oakdale, Louisiana. No party expressed interest in the allotment of Channel 253C3 at Coushatta. The Coushatta proceeding was terminated[2] and a separate *Notice of Proposed Rule Making* was issued to solicit comments on the proposed substitution of Channel 254C1 for Channel 254C2 at Oakdale. *See Oakdale, Louisiana, Notice of Proposed Rule Making,* MM Docket No. 90-594, 5 FCC Rcd 7284 (1990).

3. *The Report and Order.* In response to the *Notice* for the proposed substitution at Oakdale, CBC filed a mutually exclusive counterproposal for the allotment of Channel 253C3 to Campti, Louisiana, as that community's first local aural transmission service. No alternative channels could be located to accommodate both petitions, therefore a comparative analysis of the two proposals was made utilizing the Commission's FM allotment priorities.[3] Based on the priorities, the first local service to Campti represented a preferential arrangement of allotments and therefore, Channel 253C3 was allotted to Campti. *See Report and Order,* 7 FCC Rcd 1033 (1992).

4. *Petition for Reconsideration.* B&D argues that the Commission erred in refusing to consider its proposal in the context of the Coushatta proceeding. B&D contends that CBC's counterproposal in this proceeding constituted a late filed counterproposal in the Coushatta proceeding and should have been dismissed as untimely. B&D argues that CBC has unfairly received "two bites at the apple" by being permitted to counterpropose in this proceeding, after ignoring the Coushatta proceeding. In addition, B&D states that no applications have been filed for the allotment at Campti, and therefore the channel should be deleted and B&D's proposed upgrade should be granted.

5. *Discussion.* After consideration of B&D's petition for reconsideration and supplements[4] thereto, we will grant B&D's request for deletion of the allotment at Campti and substitution of Channel 254C1 for Channel 254C2 at Oakdale, Louisiana.

6. Although CBC made the requisite statement of interest during this proceeding, and we acknowledge that reaffirmation of a continuing interest is not required, we do believe that CBC's failure to respond to the petition for reconsideration and the specific request for deletion of the allotment to Campti, and CBC's failure to apply for the channel, constitutes an abandonment of its expression of interest.[5] No other party has expressed interest in the allotment, either in this proceeding or through filing an application.[6] We also believe that such an abandonment war-

[1] Public notice of the filing of B&D's petition was given on March 27, 1992, Report No. 1881. B&D is the successor in interest to Oakdale Limited Partnership by assignment on January 26, 1990.

[2] *See* 5 FCC Rcd 5418 (1990).

[3] The allotment priorities are (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local aural service; (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)]. *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88, 92 (1982).

[4] B&D filed two supplements to its petition for reconsideration. We are accepting B&D's supplements to its petition because no opposition to the supplements was received.

[5] B&D has alleged abuse of the Commission's process by CBC in the filing of this counterproposal. In view of our disposition herein, we see no reason to further delay termination of this proceeding by resolution of this issue. However, we again warn against filing petitions for allotments where no genuine interest exists. As we have stated, "The mere fact that a party in one proceeding files a pleading in which it states an interest in applying for a station, but subsequently fails to do so, is not sufficient evidence, by itself, of misrepresentation. On the other hand, where there is either direct evidence of misrepresentation, or evidence of a pattern of filings in which a party expresses an interest in an allotment and either voluntarily dismisses its proposal prior to action in the allotment proceeding or fails to file an application, a question may arise as to whether the party is advancing proposals in good faith." We reiterate that abuse of our processes is considered a material misrepresentation and may subject a petitioner to prosecution pursuant to Commission rules. *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3911, 3915 (1990).

[6] The filing window for Channel 253C3 at Campti, Louisiana closed on April 23, 1992.

rants the deletion of the vacant allotment and adoption of the proposed upgrade for the existing facility. The Commission discussed the rationale for allotting a channel only upon receipt of a timely expression of interest in *Santa Isabel, Puerto Rico, and Christiansted, Virgin Islands*, 3 FCC Rcd 2336, 2337 (1988):

> Absent an expression of interest, a newly allotted channel could lie vacant after the Commission had expended limited resources conducting a rule making proceeding and after parties had submitted comments regarding a proposed channel. An expression of interest is all the more important where the requested allotment action would conflict with another application. A further allotment under these circumstances would not only waste Commission and participants' resources, it could preclude additional or improved service elsewhere with no countervailing service benefit to the public. Thus, the requirement of an expression of interest is reasonable and necessary to the efficient conduct of the agency's business, and the Commission has good reason to preserve the integrity of its processes by requiring adherence.

7. We believe this rationale provides a basis for the deletion of the Campti allotment. Specifically, where a timely petition for reconsideration has been filed seeking the deletion of an allotment made in a proceeding and there has been an abandonment of the expression of interest in the new allotment as exhibited by the failure of the proponent to object to the deletion request and the absence of any applications for the channel filed during the filing window, we believe the public interest is better served by the deletion of the vacant allotment and the adoption of the alternate proposal. Therefore, we will grant B&D's petition for reconsideration to delete the Campti allotment and substitute of Channel 254C1 for Channel 254C2 at Oakdale. Because of this resolution, we need not address other arguments made in B&D's petition for reconsideration.

8. Channel 254C1 can be allotted to Oakdale in compliance with the Commission's minimum distance separation requirements. We believe the public interest would be served by substituting Channel 254C1 for Channel 254C2 at Oakdale, thereby providing that community with wide area FM service.[7]

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Oakdale, Louisiana	254C1
Campti, Louisiana	-----

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KICR-FM, IS MODIFIED to specify operation on Channel 254C1 in lieu of Channel 254C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1307 of the Commission's Rules.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, B&D Communications, licensee of Station KIRC(FM), Channel 254C2, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

12. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Memorandum Opinion and Order* by Certified Mail, Return Receipt Requested, to Mr. Fred Hannel, d/b/a Campti Broadcasting Company, 911 Edward Street, Henry, Illinois 61537.

13. IT IS FURTHER ORDERED, That the allotment of Channel 253C3, Campti, Louisiana, (RM-7660) is DELETED.

14. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by **B&D** Communications, Inc. (RM-7250) IS GRANTED.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[7] The coordinates for Channel 254C1 at Oakdale are North Latitude 30-57-47 and West Longitude 92-35-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-44

In the Matter of

Amendment of Section 73.202(b), RM-7914
Table of Allotments,
FM Broadcast Stations.
(Hattiesburg, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 21, 1992; Released: November 23, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 1911 (1992), proposing the allotment of Channel 269C3 to Hattiesburg, Mississippi, as that community's fourth FM broadcast service. The *Notice* was issued in response to a petition filed by Community Broadcasting Company, Inc. ("petitioner"). Petitioner filed comments and reply comments. William Y. Sanford ("Sanford") and Thomas William Hickman, III, Newton Broadcasting Company, Inc., Faulkner/Phillips Media, Inc. and Lou Ward ("The Group") filed separate counterproposals.[1] No other comments were received.

2. Petitioner filed comments supporting its request for the allotment of Channel 269C3 at Hattiesburg, Mississippi. In reply comments petitioner acknowledges the counterproposals filed by The Group and Sanford which suggested the allotment of Channel 226A to Hattiesburg in lieu of Channel 269C3. Petitioner states it has no desire to be drawn into a multi-party proceeding which may take some time to resolve. Therefore, petitioner contends that providing a new service to Hattiesburg on a Class A channel in a timely fashion is more important than providing a Class C3 channel to the community with the possibility of being tied into another proceeding. Therefore, petitioner indicates it will file an application for Channel 226A at Hattiesburg, if allotted.

3. We believe the public interest would be served by allotting Channel 226A to Hattiesburg, Mississippi, as that community's fourth FM broadcast service. Channel 226A can be allotted to Hattiesburg in compliance with the Commission's spacing requirements at a site 2.5 kilometers (1.5 miles) southwest of the community.[2] The site restriction will prevent a short spacing to Station WHER, Channel 279C, Hattiesburg, Mississippi.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Hattiesburg, Mississippi	221A, 226A, 279C, 283C1

5. The window period for filing applications for Channel 226A at Hattiesburg, Mississippi, will open on **January 8, 1993,** and close on **February 8, 1993.**

6. IT IS FURTHER ORDERED, That the counterproposal filed by William Y. Sanford IS DISMISSED.

7. IT IS FURTHER ORDERED, That the counterproposal filed by Thomas William Hickman, III, Newton Broadcasting Company, Inc., Faulkner/Phillips Media, Inc. and Lou Ward IS DISMISSED.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by certified mail, return receipt requested a copy of this *Order* to the following:

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[1] The counterproposal filed by Sanford requested the allotment of Channel 226A to Hattiesburg, Mississippi, as the community's fourth or fifth FM service. The Group's counterproposal proposes the substitution of Channel 269A for Channel 288A at Waynesboro, Mississippi, substitution of Channel 288C3 for Channel 288A at Bay Minette, Mississippi, substitution of Channel 288C2 for Channel 292A at Newton, Mississippi, substitution of Channel 292C2 for Channel 292A at Petal, Mississippi, allotment of Channel 226A at Hattiesburg, Mississippi, and allotment of Channel 287A at Clara, Mississippi. The counterproposals have not been placed on public notice. Sanford and The Group failed to include an affidavit verifying that the statements contained in the proposals were accurate to the best of the counterproponents' knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes ("Abuse of Process")*, 5 FCC Rcd 3910, n.41 (1990) Therefore, we believe these rules should be strictly enforced in allocations proceedings. Counterproposals must be technically and procedurally correct at the time of their filing. *See Fort Bragg, California*, 6 FCC Rcd 5817 (1991) and *Report and Order, Broken Arrow and Bixby, Oklahoma and Coffeeville, Kansas*, 3 FCC Rcd 6507 (1988), *recon. denied* 4 FCC Rcd 6981 (1989). Therefore, we will dismiss the counterproposals filed by Sanford and The Group. Even if The Group's counterproposal was procedurally correct, we note that The Group filed a similar counterproposal im MM Docket 91-303. *See* 6 FCC Rcd 6012 (1991). Final action has not been taken in that proceeding. Further, the license for Station WMFM(FM), Petal, Mississippi, Channel 292A was modified to specify operation on Channel 292C3 and the license for Station WMYQ(FM), Newton, Mississippi, Channel 292A, was modified to specify operation on Channel 250A in MM Docket 90-566, 7 FCC Rcd 4998 (1992), *recon. pending*.

[2] The coordinates for Channel 226A at Hattiesburg are 31-18-28 and 89-18-07.

William Y. Sanford
211 Smith Street
Petal, MS 39465

Thomas William
Hichman, III
WMFM(FM) Radio Station
P.O. Box 16928
Hattiesburg, MS 39402

Herman Kelly,
President, Newton
Broadcasting
Company, Inc.
P.O. Box 827
Lucedale, MS 39542

James H. Faulkner,
Chairman, Faulkner/Phillips
Media, Inc.
P.O. Box 339
Bay Minette, AL 36507

Lou Ward, Petitioner
147 Walters Road
Petal, MS 39465

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-270

In the Matter of

Amendment of Section 73.202(b), RM-8110
Table of Allotments,
FM Broadcast Stations.
(Liberty, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 22, 1992; Released: November 23, 1992

Comment Date: January 14, 1993
Reply Comment Date: January 29, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Michael S. Celenza ("petitioner") requesting the allotment of Channel 271A to Liberty, New York, as the community's second local FM transmission service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 271A to Liberty, New York, since an interest has been expressed in providing the community with its first competitive local aural service. Channel 271A can be allotted to Liberty in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4.2 miles) west to avoid short-spacings to Stations WPDH, Channel 268B, Poughkeepsie, New York, WJIV, Channel 270B, Cherry Valley, New York, and WAQY-FM, Channel 271B, Springfield, Massachusetts.[1] Canadian concurrence in the allotment is required since Liberty is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Liberty, New York	240A	240A, 271A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 14, 1993,** and reply comments on or before **January 29, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James K. Edmundson, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 271A at Liberty are North Latitude 41-46-51 and West Longitude 74-49-19.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-271

In the Matter of

Amendment of Section 73.202(b), RM-8102
Table of Allotments,
FM Broadcast Stations.
(Mountain Pine, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 23, 1992; Released: November 23, 1992

Comment Date: January 14, 1993
Reply Comment Date: January 29, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Mark Jones ("petitioner") requesting the allotment of FM Channel 270A to Mountain Pine, Arkansas, as that community's first local aural transmission service. Petitioner stated his willingness to apply for the channel, if allotted.

2. A staff engineering review of the proposal reveals that Channel 270A can be allotted to Mountain Pine consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without the imposition of a site restriction.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 270A to Mountain Pine, Arkansas, since an interest has been expressed in providing that community with its first local aural transmission service. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Mountain Pine, as follows:

	Channel No.	
City	Present	Proposed
Mountain Pine, Arkansas	--	270A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 14, 1993,** and reply comments on or before **January 29, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William J. Pennington, III, Esq.
Post Office Box 4203
Wilmington, NC 28406

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

[1] Coordinates used for Channel 270A are 34-34-18 and 93-10-12.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-282

In the Matter of

Amendment of Section 73.606(b), RM-5148
Table of Allotments,
TV Broadcast Stations.
(Santa Maria, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 22, 1992; Released: November 23, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 51 FR 24876 (July 9, 1986), issued in response to a petition for rule making filed by Pappas Telecasting Incorporated ("Pappas"), licensee of Television Station KMPH(TV), Channel 29, Visalia, California, proposing the allotment of UHF Channel 27 to Santa Maria, California, as that community's second commercial television service, and requesting the substitution of UHF Television Channel *68 for unused Channel *27 at Coalinga, California, in order to accommodate the proposal. In response to the *Notice* comments were filed by Pappas and Radio Representatives, Inc. ("Radio Rep"). Central Coast Good News, Inc. ("CCGN"), permittee for low power television Station K36AL, Paso Robles, California filed comments and reply comments.

2. In response to Pappas' request to substitute Channel *68 for unused Channel *27 at Coalinga, California, and to allot Channel 27 to Santa Maria, the *Notice* stated that the Commission does not generally favor substituting a higher reserved channel for a lower reserved channel, especially where an alternate channel not requiring the substitution is available to accommodate the commercial interest. The *Notice* further stated that UHF Channel 36+ could be allotted to Santa Maria consistent with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules, in lieu of disturbing Channel *27 at Coalinga.[1] Lastly, we requested that petitioner specify in comments whether it would apply for Channel 36+, if it were allotted.

3. In its comments, Pappas states that it is not in a position to state whether it would apply for Channel 36 at Santa Maria if allotted. Regarding its original proposal to substitute Channel *68 for Channel *27 at Coalinga, Pappas notes that any operation on Channel *27 at Coalinga would cause interference to its Station KMPH(TV) on Channel 26 at Visalia, California. Pappas further notes that Channel *22 is available for allotment at Coalinga and suggests the substitution of Channel *22, in lieu of Channel *68, for Channel *27 at Coalinga.

4. In opposing comments, CCGN contends that a full power facility operating on Channel 36 in Santa Maria would be technically incompatible with its Channel 36 low power television station at Paso Robles, California. CCGN argues that due to the size and location of Paso Robles, it is unlikely that it will have access to local service provided by a full power television station. CCGN further argues that adoption of the Commission's proposal would result in a net decrease in television service available to Paso Robles and San Luis Obispo. CCGN further contends that Channel 42, 60, or 64 could be allotted to Santa Maria in lieu of the Commission's Channel 36 proposal, thereby permitting the continued operation of its low power facility.

5. In reply comments CCGN notes that absent an expression of interest in the use of the proposed channel, it is the Commission's general policy to refrain from making a new allotment to a community, citing *Lovelock, Nevada*, 51 FR 19370, (May 29, 1986), *Las Vegas and Paradise, Nevada*, 57 RR 2d 1433 (1985), and *Brunswick and Kingsland, Georgia*, 52 RR 2d 699 (1982). CCGN states that Pappas has failed to file a statement of continuing interest in the allotment. CCGN further argues that Pappas' concern in this proceeding is not to provide service to Santa Maria, but to protect its existing facility in Visalia. This is evidenced, CCGN claims, by the fact that Pappas has expressed no interest in applying for the proposed allotment of Channel 36 to Santa Maria.

6. Radio Rep filed comments supporting the allotment of Channel 36 to Santa Maria. It stated that it would apply for the channel if it is allotted to the community.

7. As we stated in the *Notice*, although petitioner requested the allotment of Channel 27 to Santa Maria and the substitution of Channel *68 for unused Channel *27 at Coalinga, we determined that Channel 36 could be allotted, without disturbing Channel *27 at Coalinga. This was consistent with our policy of not substituting a higher reserved UHF channel for a lower one in order to accommodate commercial interests, even where the reserved channel is unoccupied and unapplied for. This is especially true where the substitution is proposed to accommodate a commercial allotment and another channel is available for commercial use, as in this case. See *Vancouver, Washington*, 45 FR 10348 (1980), and *Ashland, Kentucky, Blacksburg, Virginia, and Raleigh, North Carolina*, 49 FR 15558 (1984). This policy is designed to protect noncommercial educational channels for future use.

8. When asked to state in comments whether it would apply for Channel 36 at Santa Maria, petitioner failed to respond. Instead it argued that the proposed operation on Channel *27 at Coalinga would cause interference to its Station KMPH(TV) on Channel 26 at Visalia. However, as we stated in *Morehead City, North Carolina*, 2 FCC Rcd 4146 (1987), Section 73.612(a) of the Commission's Rules provides that operators of television stations are only protected from interference to the extent of the minimum spacing, maximum power, and maximum antenna height requirements. That provision was adopted by the Commission in the context of the adoption of the Television Table

[1] The coordinates for Channel 36 at Santa Maria are North Latitude 34-57-00 and West Longitude 120-26-00.

of Assignments. *See Sixth Report and Order on Television Allocations*, 41 FCC 2d 148 (1952). Consequently, Pappas' concerns regarding the alleged interference to its station from the proposed operation on Channel *27 at Coalinga and its proposal for Santa Maria and Coalinga to alleviate the interference need not be further considered. Channel 26 at Visalia is entitled to protection from interference to the extent of the minimum spacing and maximum power and height requirements. Since the proposed operation on Channel *27 at Coalinga was made in compliance with the Commission's distance separation requirements, Channel 26 at Visalia is not entitled to any additional protection from interference than that already provided for by the Rules.

9. CCGN contends that a full service station operating on Channel 36 will cause harmful interference to its low power television Station K36AL, Paso Robles, California. Consequently, CCGN proposes that either Channel 42, 60 or 64 be allotted to Santa Maria instead of Channel 36. While low power television stations can serve important community needs, as noted by CCGN, our policy concerning low power television is quite clear. Low power or television translator operations are considered a secondary use of a frequency and unprotected as against a proposed full broadcast use. *See* 47 CFR §74.702(b); *Future Role of Low Power Television Broadcast*, 47 FR 96 (May 16, 1982); *Murray, Kentucky*, 49 FR 32203, (October 28, 1983), *review denied, Memorandum Opinion and Order*, 2 FCC Rcd 2262 (1987). However, in this case, we believe the proposed substitution is appropriate since an alternate channel can be used. Therefore, we have determined that Channel 42+ can be allotted to Santa Maria in lieu of Channel 36+. This substitution will prevent disruption of service to the public and allow continued operation by the low power licensee. Furthermore, this allotment will not require any substitution at Coalinga.

10. Channel 42 can be allotted to Santa Maria in conformity with the minimum distance separation requirements of Section 73.610 of the Commission's Rules at the Santa Maria city reference coordinates.[2] The allotment of Channel 42 will also require a plus offset.[3]

11. In 1987, a temporary freeze was instituted in certain metropolitan areas on new allotments of television channels and construction permit applications for allotments now vacant.[4] The *Freeze Order* was adopted in order to preserve spectrum options in areas where the possibilities for providing additional spectrum for advanced television. Santa Maria is in the Los Angeles freeze zone. However, completion of this rule making is not precluded by the *Freeze Order* since this petition was filed prior to the implementation of the freeze. The *Freeze Order*, however, does apply with respect to applications for the new allotment. Applications will not be accepted for Channel 42 until after the freeze is lifted.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1993,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Santa Maria, California	12+, 42+

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[2] The coordinates for Channel 42 at Santa Maria are 34-57-00 and 120-26-00.

[3] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin*, 3 FCC Rcd 6765 n.1 (1988).

[4] *See Order, Advanced Television Systems and Their Impact on the Existing Television Service* ("*Freeze Order*"), 52 Fed. Reg. 28346, published July 29, 1987. The *Freeze Order* states that the Commission will not accept applications for construction permits for vacant television allotments within the minimum co-channel separation of thirty cities, including Los Angeles, pending completion of the advanced television proceeding. Santa Maria is 225.1 km (139.9 miles) from Los Angeles. The UHF Zone 2 co-channel spacing requirement (freeze radius) is 280.8 km (174.5 miles). Thus, Santa Maria is in the Los Angeles freeze zone.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-466

In the Matter of

Amendment of Section 73.202(b),	RM-7327
Table of Allotments,	RM-7987
FM Broadcast Stations.	RM-7988
(Hondo, Hollywood Park and Dilley, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 27, 1992; Released: November 23, 1992

By the Chief, Allocations Branch:

1. At the request of Radio Medina, Inc. ("petitioner"), permittee of Station KRBH-FM, Channel 253A, Hondo, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6265 (1990), proposing the substitution of Channel 254C3 for Channel 253A at Hondo, and modification of Station KRBH-FM's construction permit to specify operation on the higher powered channel. Although petitioner filed comments stating its intention to apply for Channel 254C3, if allotted, it subsequently withdrew its expression of interest.[2] Counterproposals were filed by M&R Communications, Inc. ("M&R"), Aguilar Broadcasting of Texas ("Aguilar"), and Reding Broadcasting Company ("Reding").[3] Cosmopolitan Enterprises of Victoria, Inc. ("Cosmopolitan"), licensee of Station KTXN-FM, Channel 254C2, Victoria, Texas, and Steven S. Monroe, President of Big Pine Broadcasting ("Monroe"), licensee of Station KHLC-FM, Channel 252A, Bandera, Texas, filed comments.[4] Reply comments were filed by petitioner, Aguilar, Reding and Peter S. Steigerwald ("Steigerwald").[5] Reding filed a supplement to its reply comments.[6]

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[1] The communities of Hollywood Park and Dilley, Texas have been added to the caption.

[2] Petitioner withdrew its petition for rule making and comments supporting the substitution of Channel 254C3 for Channel 253A at Hondo after the record closed. Therefore, the comments and responses relating to the Hondo proposal will not be discussed and the proposal will be dismissed. In accordance with Section 1.420(j) of the Commission's Rules, petitioner submitted a statement that it has not received any money or other consideration, directly or indirectly, in exchange for the withdrawal of its petition for rule making.

[3] Public Notice of M&R and Aguilar's counterproposals was given on May 14, 1992, Report No. 1890.

Reding's counterproposal was found to be technically unacceptable for consideration and therefore was not placed on public notice. Reding requested the substitution of Channel 253A for Channel 252A at Pleasanton, Texas, and the modification of Station KBOP-FM's license accordingly. In order to accommodate the substitution at Pleasanton, Reding also requested the substitution of Channel 276A for Channel 252A at Bandera, Texas, and the modification of Station KHLC-FM's authorization accordingly; the allotment of Channel 276C2 to Karnes City, Texas; and the substitution of Channel 290A for Channel 253A at Hondo, Texas. Reding's proposal was examined according to the new minimum distance separation rules that became effective October 2, 1989. *See* MM Docket No. 88-375, 4 FCC Rcd 6375 (1989). Pursuant to the new requirements, six kilowatt Class A channels are examined as Class B stations with respect to Mexico. Using the coordinates specified in Reding's proposal, our engineering analysis indicates that Channel 276A at Bandera is short-spaced to vacant Channel 276B, Ciudad Acuna, Coahila, Mexico; and Channel 290A at Hondo is short-spaced to vacant Channel 290C, Sabinas, Coahila, Mexico. Therefore, Reding's counterproposal will not be considered herein.

M&R requested the allotment of Channel 253A to Hollywood Park, Texas (RM-7987). We have determined that the counterproposal failed to include a affidavit verifying that the statements contained in its proposal were accurate to the best of M&R's knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In absence of such verification, the petition may be dismissed. Section 1.420(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3910, n.41 (1990) ("*Abuse of Process*"). M&R's counterproposal was filed after the October 4, 1990, effective date of the *Abuse of Process* item, which stated that Section 1.52 should be strictly enforced in allotment proceedings. Counterproposals must be technically and procedurally correct at the time of filing. *See Fort Bragg, California*, 6 FCC Rcd 5817 (1991), and *Report and Order (Broken Arrow and Bixby, Oklahoma and Coffeeville, Kansas*, 3 FCC Rcd 6507 (1988), *recon denied*, 4 FCC Rcd 6981 (1989). Therefore, we will dismiss M&R's counterproposal.

[4] Cosmopolitan and Monroe's reply comments were late-filed and no request for their acceptance was filed. We need not discuss these comments, since we have dismissed Reding's counterproposal and petitioner has withdrawn its petition for rule making.

[5] Steigewald filed comments in response to the Commission's Public Notice noting M&R's counterproposal which included the deletion of vacant Channel 256A at Campwood, Texas, or the substitution Channel of 235A for Channel 256A. Steigewald opposes the deletion of Channel 256A and states his intention to file an application for Channel 256A at Campwood, Texas. Since we are dismissing M&R's counterproposal as unacceptable this issue is now moot.

[6] Reding filed a motion to leave to file an untimely supplement to its reply comments. We will not consider these comments in light of our dismissal of M&R's counterproposal.

2. In its counterproposal, Aguilar requests the allotment of Channel 255C2 to Dilley, Texas, as that community's first local aural transmission service. In support of its request, Aguilar states that Dilley has experienced recent growth as a result of the construction of a new state prison and increased oil production in the area. In addition, Aguilar notes that according to the 1985 *Rand McNally Cosmopolitan World Atlas*, Dilley had a 1980 population of 2,579.

3. After consideration of the information filed in this proceeding, we believe the public interest would be served by the allotment of Channel 255C2 to Dilley, Texas. The adoption of Aguilar's counterproposal would provide Dilley, which according to the 1990 U.S. Census has population of 2,632, with it first local aural transmission service. Channel 255C2 can be allotted to Dilley in compliance requirements without the imposition of a site restriction.[7] Since Dilley is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for this allotment.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Dilley, Texas	255C2

5. The window period for filing applications will open on **January 8, 1993,** and close on **February 8, 1993.**

6. IT IS FURTHER ORDERED, That the petition for Rule Making filed by Radio Medina, Inc. seeking the substitution of Channel 254C3 for Channel 253A at Hondo, Texas (RM-7327), IS DISMISSED.

7. IT IS FURTHER ORDERED, That the counterproposal filed by M&R Communications, Inc. (RM-7987) IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[7] The coordinates for Channel 255C2 at Dilley are North Latitude 28-40-18 and West Longitude 99-10-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-172

In the Matter of

Amendment of Section 73.202(b), RM-6965
Table of Allotments,
FM Broadcast Stations.
(Leland, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 26, 1992; Released: November 23, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 5227 (1992), proposing the substitution of Channel 232C2 for Channel 232A at Leland, Mississippi, and modification of the license for Station WBAD(FM) accordingly. The *Notice* was issued in response to a petition filed by Interchange Communications, Inc. ("petitioner"). Petitioner filed comments restating its interest in the allotment at Leland. No other comments were received.

2. We believe the public interest would be served by substituting Channel 232C2 for Channel 232A at Leland, in order to provide the community with its first wide coverage area FM service. As indicated in the *Notice*, Channel 232C2 can be allotted to Leland, Mississippi, consistent with the Commission's spacing requirements at petitioner's specified site.[1] Channel 232C2 at Leland is short spaced to Channel 232A, Station KTRY-FM, Bastrop, Louisiana, and to Channel 232A, Station KTGY(FM), Charleston, Mississippi. However, the license for Station KTRY-FM, Bastrop, was modified to specify operation on Channel 230C2 in Docket 84-231, 7 FCC Rcd 470 (1992), and the construction permit for Station KTGY(FM), Charleston, was modified to specify operation on Channel 239A in Docket 88-14, 3 FCC Rcd 4315 (1988). The issuance of a license for Station WBAD(FM) on Channel 232C2 may be withheld until Station KTRY-FM is licensed on Channel 230C2 and Station KTGY(FM) is licensed on Channel 239A. We will authorize a modification of the license for Station WBAD(FM), Channel 232A, to specify operation on Channel 232C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Leland, Mississippi	232C2, 227A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WBAD(FM), Leland, Mississippi, IS MODIFIED to specify operation on Channel 232C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission, Shall Send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Jamie Patrick
Broadcasting, Ltd.
Bastrop, Louisiana 71022

Charleston
Broadcasting Co., Inc.
Shelton Road
P.O. Box 9
Charleston, Mississippi 38921

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Interchange Communications, Inc., licensee of Station WBAD(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 232C2 at Leland are 33-24-55 and 90-59-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-591

In re Application of

NANCY NALESZKIEWICZ — File No. 10494-CL-P-430-A-89

For a construction permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunications Radio Service to serve the Kansas - 3 (Jewell) Rural Service Area

APPEARANCES

William L. Fishman, Eric Fishman, and *Jane B. Maxwell* on behalf of Nancy Naleszkiewicz; *Carl W. Northrop* and *E. Ashton Johnston* on behalf of Committee for a Fair Lottery; *Dean George Hill* and *Timothy E. Welch* on behalf of Pacific Nationwide Cellular; and *Gerald M. Zuckerman* on behalf of Chief, Common Carrier Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: November 13, 1992; Released: November 24, 1992

1. This case was designated for hearing on November 21, 1990 to determine whether Nancy Naleszkiewicz is qualified to be a Commission licensee. *Hearing Designation Order,* 5 FCC Rcd 7131 (CCB 1990). Ms. Naleszkiewicz was selected in a Commission lottery to provide domestic public cellular telecommunications radio service in the rural service area Kansas-3 (Jewell) market. Questions about Ms. Naleszkiewicz' qualifications to become a licensee were raised by Pacific Nationwide Cellular (Pacific) and the Committee for a Fair Lottery (the Committee) and they, along with the Common Carrier Bureau, are parties in this proceeding. *Id.* at 7138. The following issues will be considered in this decision:

1. To determine all facts and circumstances surrounding the failure of Genesis to file its clients' RSA applications for the filing windows beginning on January 4, 1989, and January 11, 1989;

2. To determine all the facts and circumstances surrounding the filing by Genesis of the inclusion requests;

3. To determine from the evidence adduced above, the extent, if any of Nancy Naleszkiewicz' involvement in these events;

4. To determine, based on the evidence adduced under issues 1 through 3, whether Nancy Naleszkiewicz made or was involved in the making of material misrepresentations to the Commission or demonstrated a lack of candor;

5.

(a) To determine the facts and circumstances surrounding the submission and prosecution by Nancy Naleszkiewicz of the "Motion to Enter Appearance Late, Request to Appear at the Hearing and to Present Evidence on Behalf of Nancy Naleszkiewicz," filed January 30, 1991;

(b) To determine in light of the evidence adduced pursuant to the foregoing issue, whether Nancy Naleszkiewicz misrepresented facts to the Commission, or exhibited a lack of candor, and, if so, whether she should be disqualified; and

6. To determine, based on the evidence adduced pursuant to all the above, whether Nancy Naleszkiewicz possesses the requisite qualifications to be a Commission licensee and whether a grant of her application would be in the public interest.

2. A prehearing conference was held on January 30, 1991. Tr. 1-16; *Order,* FCC 90M-3769, released November 30, 1990. Written testimony and exhibits were exchanged on June 8, 1992. *Order,* FCC 92M-610. Sessions to examine witnesses orally about their written testimony were held on June 22, 1992 (Tr. 16-236), June 23, 1992 (Tr. 237-436), June 24, 1992 (Tr. 437-685), June 25, 1992 (Tr. 686-951), and June 26, 1992. Tr. 952-1199. The record was closed on June 26, 1992. Tr. 1199; *Order,* FCC 92M-723, released June 30, 1992. On August 14, 1992, proposed findings and conclusions were filed by all parties. On September 4, 1992, replies were filed by only Naleszkiewicz and the Committee.

FINDINGS OF FACT

Background -- Genesis' Operations

3. Genesis was formed in January 1986. Tr. 137. Its officers and directors were originally Wladimir Naleszkiewicz, who was President and Treasurer, and his spouse, Nancy Naleszkiewicz, who was Vice President and Secretary. Tr. 138; Naleszkiewicz Exh. NN at 2; and Naleszkiewicz Exh. VN at 1. Mr. Naleszkiewicz owns 75% of the stock of the company, and Ms. Naleszkiewicz owns 25%. Tr. 138. Mr. Naleszkiewicz resigned as an officer and director in February 1990. Naleszkiewicz Exh. VN-1 at 1. In February 1990, Ms. Naleszkiewicz became President, secretary and Treasurer. Naleszkiewicz Exh. NW at 1. Genesis describes itself as a business and engineering consulting firm with its primary service being the preparation of cellular non-wireline RSA applications. Committee Exh. 2.

4. Prior to working at Genesis, Ms. Naleszkiewicz was employed by Satellite Systems Engineering, Inc. (SSE), a company that prepared applications for cellular authorizations, from spring 1983 until late 1984. Tr. 136, 137-38. She managed a group of ten to twelve employees. Tr. 136. At the same time she worked at SSE, and also both prior

to and after working at SSE, Ms. Naleszkiewicz was employed by the Chesapeake & Potomac Telephone Company (C&P), where she was a directory assistance operator and handled employee problems. Tr. 135-36, 138, 141. She worked at C&P for approximately ten years, through 1985. Tr. 135, 138. She previously held other jobs. Tr. 162.

5. Mr. Naleszkiewicz stated that while he was President of Genesis he "ran the company." Naleszkiewicz Exh. VN at 7. He "handled the company's financial matters, including accepting and depositing client revenues, administration of bank accounts, working with Lee Curtis, the company's CPA, and setting of sales commissions. [He] interfaced with some clients and outside brokers, opened the mail, made the company's decisions and supervised its overall operations." *Id.*

6. Genesis originally contracted with clients to prepare applications for Metropolitan Service Area licenses. Naleszkiewicz Exh. NN at 2. Ms. Naleszkiewicz described Genesis' efforts as successful. *Id.* In late 1986 or early 1987, Genesis began marketing its services and contracting with clients to prepare and file applications for RSA licenses. Tr. 155-56.

7. On February 7, 1990, Mr. Naleszkiewicz resigned as President of Genesis and a related entity, Genesis Management Services, Inc. (GMSI) and Ms. Naleszkiewicz became President of both companies. Naleszkiewicz Exh. VN at 19; Naleszkiewicz Exh. VN-2; Tr. 432-33. Ms. Naleszkiewicz said she currently "basically" handles the finances and deals with the companies' accountant and consults with her spouse if she has problems. Tr. 434-35.

8. At present, Genesis "is not doing any . . . work or filings," Tr. 432; the company only rents "certain intangible assets" to GMSI. Tr. 703. Since February 1990, Ms. Naleszkiewicz stated "our business has primarily been operated through [GMSI]. . . ." Naleszkiewicz Exh. NN at 14. GMSI prepares applications for wireless cable and unserved cellular areas and has collected money from clients although the filing windows have not yet opened. Tr. 705-07. Ms. Naleszkiewicz also is an officer of a third related entity, Genesis Southwest, of which her spouse is still President. Tr. 137, 444.

9. Mr. Naleszkiewicz became a "consultant" to Genesis and GMSI after he resigned. Naleszkiewicz Exh. VN at 1. He testified his duties and functions as consultant are "entirely different" from when he was an officer -- "I'm asked an opinion, and I give advice, but I don't take decisions." Tr. 702. Ms. Naleszkiewicz testified her husband decided GMSI would file applications for wireless cable and which markets to file for. Tr. 433-34.

Ms. Naleszkiewicz' Involvement in Genesis' Operations

10. Ms. Naleszkiewicz testified she was Genesis' Vice President in "title only." Tr. 536. She began working at Genesis when, in early 1986, she took a month off from her job at C&P to help her spouse set up Genesis, and never returned to C&P. Naleszkiewicz Exh. NN at 2. During Genesis' MSA program, Ms. Naleszkiewicz was responsible for "accounts payable, personnel matters, Workmen's Compensation filings, employee insurance matters," and was "actively involved in the physical preparation and production of applications." *Id.* She also handled bookkeeping and paperwork related to Genesis' Alliance Program. Tr. 177-78; Committee Exh. 3 at 2. Genesis MSA program ended in mid-1987. Tr. 141.

11. In April 1987, Mr. Naleszkiewicz had quadruple bypass heart surgery. Naleszkiewicz Exh. NN at 3. He spent several months recovering at home and returned to Genesis full time in late summer or early fall of 1987. Tr. 148-49. For four months, Ms. Naleszkiewicz served as President and managed the day to day business operations of Genesis. Tr. 139. Naleszkiewicz Exh. NN at 3. While President, she began writing payroll checks (*id.* at 4) and writing commission checks to the Genesis marketing staff. Tr. 143-44.

12. Ms. Naleszkiewicz "was able to keep the company afloat" in her spouse's absence. Naleszkiewicz Exh. NN at 3-4. She established working relationships with Genesis' managers. Tr. 140. "The first thing I did after my husband's surgery is I called the head of every department and talked to them and said what are you doing now? What is your time schedule? What are you supposed to be doing? Because I had to get a feel. I really didn't know what everybody was doing." Tr. 155.

13. Genesis actively marketed its services for RSA applications and collected funds from clients while Mr. Naleszkiewicz was out. Tr. 143. Genesis had its own marketing department and also collected money from outside brokers. Tr. 144-45. Ms. Naleszkiewicz testified "at that time . . . monies were coming in . . . fairly good." Tr. 152. Ms. Naleszkiewicz and Paul Jennings were responsible for depositing incoming money. Tr. 146. When she received a check, she would "stamp the back and [take] it to the bank and then put a copy of it in the revenue file, and then a copy of it went to who was keeping client records at that time . . .." Tr. 588. Her spouse kept a revenue file in his desk. Tr. 184.

14. While President, Ms. Naleszkiewicz participated in settlement discussions and negotiations involving a Genesis client. Tr. 302, 304-05. The discussions were conducted by telephone. Tr. 302. Genesis failed to file MSA applications for three partnership clients, and the partnerships filed a civil suit in California that ultimately went to arbitration and was settled. Tr. 795-96. Committee Exh. 36, received by Genesis on June 22, 1987, reflects the arbitrator's decision that Genesis had not filed the applications and had not abided by an offer to mitigate by filing applications for the plaintiffs in later lotteries. Tr. 302. Ms. Naleszkiewicz knew Genesis had failed to file the applications and that as a result of the settlement, Genesis prepared and filed RSA applications for Cell-Cal III-IV-VI (Cell-Cal) for which Cell-Cal paid no fees. Tr. 300. Mr. Naleszkiewicz testified, the unfiled applications "were just thrown out by one of the [Genesis] employees who couldn't stand . . . the particular broker" (Tr. 796) and that Ms. Naleskiewicz was aware of these circumstances. Tr. 812-13.

Ms. Naleszkiewicz' Involvement During RSA Marketing and Involvement in Filing Operations

15. A brochure prepared by Genesis to market itself to prospective RSA clients states "Ms. Naleszkiewicz is an experienced Office Administrator with a background in marketing, management, communications and also liaison work with Federal and State agencies. Her telecommunications experience over 10 years includes positions with [C&P] and [SSE]." Committee Exh. 2 at 2; Tr. 166.

16. The first RSA filings were in July 1988. Between July 1988 and January 1989 the Commission accepted applications for 478 RSA markets during 22 separate filing windows. *See* Committee Exh. 12. The 22 filing windows were divided into five "Blocks." *See id.*; Tr. 198. Ms. Naleszkiewicz knew that each client for whom Genesis prepared

RSA applications executed a Services Agreement with Genesis and paid Genesis a fee, which "varied depending on the number of applications filed, the date they were ordered, and other commercial circumstances." CCB Exh. 12 at 2.

Knowledge of Genesis' Financial Operations

17. Ms. Naleszkiewicz asserted her spouse "was the only person at Genesis who reviewed, and was informed of, the company's financial status and bank balances." Naleszkiewicz Exh. NN at 3. Despite that claim, Ms. Naleszkiewicz explained that Genesis originally had one bank account, all deposits went into that account, and all bills and commission checks were written on the account. Tr. 150. She said she did not balance the account (Tr. 150) but had a "general feel" for how much money was in the account "since I really wasn't writing very many checks." Tr. 152. She and her spouse were the only Genesis employees with authority to sign checks. Naleszkiewicz Exh NN at 3; Naleszkiewicz Exh. VN at 8. She continued to pay bills and write payroll checks. Tr. 140; Naleszkiewicz Exh. NN at 4.

18. Ms. Naleszkiewicz testified that about the time of the first RSA filings, her spouse opened a second, "money market" or "escrow" bank account for Genesis. Tr. 172, 174. However, "the bank got upset because you could only write so many checks a month on that account . . . so then . . . he had to open the other account so he could write checks on that account." Tr. 174-75. Ms. Naleszkiewicz said the third, "disbursement" account "was strictly I think for FCC fees." Tr. 173; *see* Tr. 191. It was her understanding the disbursement account was not for operating expenses. Tr. 260.

19. Ms. Naleszkiewicz testified her spouse decided which account incoming money would be deposited into. Tr. 191. Filing fees collected from clients were deposited into the money market account, then transferred into the disbursement account. Tr. 925-26. She stated her spouse "kept the money in [the money market account] as long as possible to collect the interest." Tr. 617. Mr. Naleszkiewicz stated that "[p]rior to an RSA filing window, it was my normal practice to transfer funds from the escrow account to the escrow disbursement account in an amount sufficient to assure that the FCC fee checks would clear our bank." Naleszkiewicz Exh. VN at 9.

20. Genesis memoranda indicate Ms. Naleszkiewicz received the original and a copy of each check received from a client; a copy of each application; a copy of each Disclosure Statement; a copy of each signature page; a copy of each Services Agreement; and a copy of each Addendum. Committee Exh. 4 at 1, 2; *see* Tr. 184,185, 187. Mr. or Ms. Naleszkiewicz also received the original check. Committee Exh. 4 at 2. Ms. Naleszkiewicz admitted she kept client files and received these documents. Tr. 185-86. Genesis employee Nancy Wardinski (Wardinski) confirmed that throughout Genesis' entire RSA filing program "[e]verything that we did practically [Ms. Naleszkiewicz] received a copy of, but how many things she actually reviewed and so on, I don't know." Tr. 664; Tr. 684. Ms. Naleszkiewicz testified she eventually "put a stop" to receiving the materials, Tr. 186, but did not remember when this was and did not send a memorandum to this effect. Tr. 188. She testified she threw away most of the materials, but did not remember when this occurred. Tr. 186.

21. Genesis' accountant is Lee Curtis (Curtis), who has worked for Genesis since December 1986. Naleszkiewicz Exh. EC at 1. Between December 1986 and December 1990 he "issued monthly financial compilation statements for the company, reconciled the bank statements on a monthly basis, prepared the quarterly and annual payroll reports, and annual corporate income tax returns." *Id.* Committee Exhs. 26 and 27 are Curtis' monthly compilation reports for December 1988 and January 1989. Tr. 989-90. Each month Curtis sent Genesis a compilation report and returned the relevant financial documents provided by Genesis within a week or two of receiving financial documents from Genesis. Tr. 960; Naleszkiewicz Exh. EC at 2. Curtis testified he sent a copy each month during 1988. Tr. 959.

22. According to her spouse, Ms. Naleszkiewicz received a copy of the compilation report each month. Tr. 938. Curtis stated he sent at least two copies. Tr. 960. Ms. Naleszkiewicz first testified she only started getting them after she became President (Tr. 262) but later admitted that before that she "sometimes" got a copy, and she was aware that the statement was sent each month. Tr. 262-63. These statements clearly indicate the balances of the various Genesis accounts. *E.g.* Committee Exh. 26 at 4; Committee Exh. 27 at 5.

23. Curtis described compilation work as "nothing more than taking information from someone, and I will put it in a format that's understood and give it back to them . . .. [M]y assurance is limited to the format, the presentation of the material, not the accuracy or verification [there]of." Tr. 957-58. *See* Tr. 958-59; 980. Common sense and knowledge of the company's business, Curtis said, could enable anyone to understand his monthly reports. Tr. 961-62.

24. Curtis was familiar with and prepared bank reconciliations each month for the operating, escrow, and escrow disbursement accounts, Tr. 971-72, and knew the purpose of the escrow disbursement account was for payment of FCC filing fees. Tr. 976-77.

25. According to Curtis, "Genesis had organized procedures for keeping track of its monies," which he described in detail. Naleszkiewicz Exh. EC at 3. He described Mr. Naleszkiewicz' recordkeeping as "meticulous." Tr. 969. Curtis stated that "[t]o reconcile the [escrow disbursement] account, we would adjust the balance in the monthly bank statement against the outstanding disbursements that month, which we obtained from the Genesis check register or from Dr. Naleszkiewicz' oral advice as to what check numbers were written on the account that month and for what amounts." Naleszkiewicz Exh. EC at 3.

26. Genesis also received monthly statements from its bank for each of its accounts. Tr. 754. For the disbursement account, the bank mailed the statement prior to sending Genesis the cancelled checks. Tr. 939. Mr. Naleszkiewicz said he received in February 1989 Committee Exh. 17, a statement for the disbursement account for January 1989. Tr. 758. The bank statements list by number the checks that cleared the preceding month. *See, e.g.*, Committee Exhs. 16, 17. Ms. Naleszkiewicz was aware that the bank returned the checks in boxes and indicated she may have had the bank statements at one time. Tr. 526.

27. Ms. Naleskiewicz signed "virtually all" of the filing fee checks that were attached to each application filed (Naleszkiewicz Exh. NN at 3) and she testified that although her spouse "may have signed them at first," she thereafter signed them all. Tr. 223. She knew each filing fee check was drawn on the disbursement account and she

never signed a check drawn on that account that was not for filing fees. Tr. 223. She stated she never asked "whether there were sufficient funds in the account to pay" the checks written on the disbursement account. Naleszkiewicz Exh. NN at 3. However, she "always asked" her husband if there was enough money when she wrote checks for bills and payroll. Tr. 616.

28. In her deposition in this proceeding Ms. Naleszkiewicz stated the escrow and disbursement accounts were closed in "February or March, something like that" of 1989. Tr. 255-56. At the hearing, she could not remember when the accounts were closed. Tr. 255. Mr. Naleszkiewicz testified the disbursement account was closed "around March" 1989. Tr. 756.

Ms. Naleszkiewicz' Knowledge of Other Areas of Genesis' Operations

29. For the first 20 of the 22 filing windows, Genesis employees drove applications to the Commission's filing facility in Pittsburgh, Pennsylvania. Naleszkiewicz Exh. NN at 6; Tr. 273, 279. According to Ms. Naleszkiewicz, the employees typically left Genesis at 4 a.m. on the morning of the second day of the three-day filing window. Tr. 273-74.

30. Ms. Naleszkiewicz on occasion assisted in preparing and packaging applications. Naleszkiewicz Exh. NN at 5-6. She knew Genesis attached to each application a transmittal sheet as proof that the applications were actually filed. Tr. 274. The transmittal sheet "would normally [be] stamped at the FCC filing office and brought back by the Genesis employees who drove the applications to Pittsburgh for filing." Naleszkiewicz Exh. NN at 6. Receiving such proof was an important concern of Genesis. Tr. 286.

31. At the final RSA filing window in January 1989, Genesis laid off its production staff but kept five front office personnel. Tr. 254-55; 803. Ms. Naleszkiewicz stated she "was depressed about having to lay off the employees . . .." Naleszkiewicz Exh. NN at 7. However, Genesis employee Vicki Dominique stated "[w]e were expecting to be laid off by Genesis because the RSA filings were ending with that filing window." Naleszkiewicz Exh. VD at 4. She had known "since [she] started in September [1988]" that she would be let go in January 1989. Tr. 337. At her deposition in this proceeding Dominique stated "nobody was offended by" receiving the letter of termination because they knew their jobs were temporary. Tr. 337-38.

Ms. Naleszkiewicz Enjoyed the Rewards of Her Position

32. While Ms. Naleszkiewicz was Vice President she and her spouse were both well compensated. Committee Exh. 35 at 20 reflects that Mr. and Ms. Naleszkiewicz' salaries for 1986 were $118,400 and $67,650, respectively; for 1987, $96,100 and $46,900, respectively; for 1988, the date on which the exhibit was prepared, $31,200 plus bonuses, and $20,800, respectively. The 1988 salary figures in this exhibit are corroborated by the only W-2 forms introduced into evidence by the Naleszkiewiczes. Naleszkiewicz Exhs. NN-11 and VN-3. The Naleszkiewiczes also enjoyed a comfortable lifestyle, making a $290,000 cash downpayment on a home in June 1988 and purchasing Jaguar and BMW automobiles. Committee Exh. 13 at 6, 7; Tr. 232. Mr. Naleszkiewicz stated "we travel a lot," and remembered "several business trips" in 1988. Tr. 1052. Ms. Naleszkiewicz confirmed trips to France in 1988 and to Portugal, Bermuda and Denmark in 1989. Tr. 445, 447.

Ms. Naleszkiewicz Had Notice of Genesis' Purported Financial Problems

33. The Commission had not yet begun accepting applications for the RSAs when Genesis began marketing its RSA services and collecting money. Ms. Naleszkiewicz testified Genesis was aware that the Commission would impose a filing fee, but not the amount. Tr. 193. She said she learned in early summer 1988 that Genesis' former marketing director had not told clients there would be FCC filing fees. Tr. 194.

34. Ms. Naleszkiewicz testified that after the FCC imposed a $200 filing fee requirement for each RSA application "it was Nancy Wardinski's job to go back and say okay, now we are really filing and there is going to be filing fees and you owe x amount of money." Tr. 192; *See* Tr. 194. In May and June of 1988, Wardinski called clients to inform them they had to pay the filing fees. Tr. 635-36. According to Wardinski, "[A]s we started the [RSA] filings, we realized a lot of people still owed FCC filing fees, and we realized we should have a good accounting of what was still owed." Tr. 633. Wardinski has been employed by Genesis and GMSI since September 1986 as an Administrative Assistant. Naleszkiewicz Exh. NW at 1.

35. At Mr. Naleszkiewicz' suggestion, Wardinski's son Paul prepared charts in mid-July 1988 showing which clients owed filing fees. Tr. 634, 635. These charts are Committee Exhs. 10 and 11. Mr. Naleszkiewicz testified he realized Genesis might have money problems when he saw the first chart. Tr. 807. He stated, "that's just filing fees, not any engineering fees that were not paid." Tr. 807. Genesis never prepared a similar study showing clients who owed engineering fees. Tr. 921. Mr. Naleszkiewicz stated the charts were based on "assumptions . . . that all these clients will continue to file throughout the whole application period." Tr. 786.

36. Although Ms. Naleszkiewicz testified she first saw the charts during discovery in this proceeding, she also said she did not see them when they were prepared "as far as I can remember." Tr. 199. The evidence indicates she was aware of the charts. She knew Paul Wardinski was paid on an hourly basis to prepare the charts, and that after they were prepared Nancy Wardinski began calling clients to collect filing fees. Tr. 197. She knew the charts reflected an "assumption" that clients would file for all RSA markets. Tr. 198-99, and cited herself and her spouse as examples of those who did not file all the applications indicated by the charts. Tr. 612-13.7

37. Mr. and Ms. Naleszkiewicz each filed RSA applications for the first three Blocks (Blocks 2, 5, and 3). Tr. 202, 203-04; *see* Committee Exh. 12. The last Block 3 filing window closed October 28, 1988. Committee Exh. 12 at 6. Neither paid their filing fees before their applications were filed. *See* Tr. 207-08, 789. They did not file applications in the last two Blocks because they did not have money for filing fees. Tr. 261-62.

38. Mr. Naleszkiewicz testified Genesis "didn't collect some FCC fees and our engineering fees" but Genesis still filed applications for those clients. Tr. 782; *see* Naleszkiewicz Exh. VN at 6. Ms. Naleszkiewicz knew clients were allowed to pay their fees in installments, and "they would pay block by block or filing by filing as long as the last filing, that they would have paid by then." Tr. 197. She said "we were not able to collect some of the" filing fees from clients, but did not know the amount. Tr. 596, 613. She knew her spouse and Wardinski attempted to collect the fees. Tr. 192; 613.

39. Ms. Naleszkiewicz stated she was "preoccupied" from summer 1988 until November 1988 due to her niece's medical problems. Naleszkiewicz Exh. NN at 4. However, although she and her spouse both stated she "spent the last two and a half months of her [niece's] life going to work during the day and driving to . . . Baltimore each night" (*id.* at 4-5; Naleszkiewicz Exh. VN at 11), in October 1988 the Naleszkiewiczes traveled to Cannes, France. Tr. 446. Her niece died in November 1988. Naleszkiewicz Exh. NN at 5.

40. Mr. Naleszkiewicz stated that after his spouse's niece died he "purposely did not tell her about the poor financial position of the company because I did not want to add to her burden." Naleszkiewicz Exh. VN at 11. Nevertheless, he did tell her in November 1988 that "money was getting tight at the company." Naleszkiewicz Exh. NN at 5.

41. According to Mr. Naleszkiewicz, by late 1988 he "had only a general idea what the various bank balances were" (Naleszkiewicz Exh. VN at 10), and "[b]y the beginning of January 1989 I had lost the 'feel' for how much money there was in the various Genesis bank accounts. I knew that Genesis did not have sufficient funds to cover the FCC filing fees . . .in the last two filing windows." *Id.* at 11. The evidence suggests that Genesis did not have sufficient funds to cover the final December 1988 filing either, which was December 14-16. Tr. 927.

42. On December 14, 1988, the Naleszkiewiczes jointly completed a credit application for a $150,000 loan from The Money Store. Committee Exh. 13 at 5, 7. In an affidavit attached to The Money Store note the Naleszkiewiczes represented that "[t]he purpose of this loan is to obtain operating expenses for our corporation known as Genesis Enterprises, Inc." *Id.* at 3.

43. The bank statement for Genesis' escrow disbursement account for December 1988 shows 591 items returned checks, for $200 each, for a total of $118,200. Committee Exh. 16 at 2-14. The date indicated for each transaction was either December 20 or 23, 1988. Mr. Naleszkiewicz testified the reason there were insufficient funds in the disbursement account was that he did not get the loan check from The Money Store in time to deposit it into the escrow disbursement account. Tr. 927-28. The bank had notified Genesis that the disbursement account had insufficient funds. Tr. 927. Ms. Naleszkiewicz was aware that the bank had called, and said she and her spouse were in West Virginia when the "bank called Nancy Wardinski and she tracked down Wlad," Tr. 233, although she testified that she did not "remember when that was. I don't remember much about the last of 1988." Tr. 233.

44. Mr. Naleszkiewicz testified to having no recollection of telling his spouse the money was, in fact, needed for the disbursement account to cover filing fees (Tr. 931) and said he did not tell his spouse how The Money Store funds would be used. Tr. 1147. However, in his deposition in this proceeding Mr. Naleszkiewicz did say he told his spouse they needed the Money Store loan only because Genesis "didn't have enough cash" to cover the filing fee checks written on the disbursement account. Tr. 251-53; 1170-71. He stated, "I told her we needed money and I'm trying to collect from various brokers . . ., but in the meantime, we have to file . . .." Tr. 1169.

45. Ms. Naleszkiewicz testified her spouse did not tell her The Money Store loan would be used to cover filing fees. Tr. 253. In her direct case, Ms. Naleszkiewicz stated "[t]o the best of my recollection my spouse advised me that additional money was needed to keep the company going after the upcoming filing windows in January, 1989 which were the last RSA filing windows." Naleszkiewicz Exh. NN at 5.

46. Other evidence, however, suggests she knew the purpose of the loan and that the Naleszkiewiczes misrepresented the purpose of the loan to The Money Store. The entire proceeds of the loan were deposited into Genesis' escrow disbursement account, the account on which filing fee checks were written, on December 27, 1988. Committee Exh. 14 at 3. *See* Committee Exh. 16 at 14. The Money Store check was made out to the Naleszkiewiczes, and they both endorsed it directly below the following language: "Pay to the order of The Genesis Enterprises, Ltd. Escrow Disbursement Acct." Committee Exh. 14 at 1-2.

47. The Naleszkiewiczes represented to The Money Store that the purpose of the loan was for operating expenses. Committee Exh. 13 at 3. However, although Ms. Naleszkiewicz knew that operating expenses were for "[t]he commercial account to pay payroll and keep the company running" (Tr. 222), she, along with her spouse, endorsed the loan proceeds over directly into the disbursement account. Moreover, she knew some of the money would be used to pay her own filing fees. Tr. 218.

48. According to Mr. Naleszkiewicz, the loan proceeds were "deposited in the disbursement account, and it was allocated." Tr. 1133. "$118,000 plus . . . became a stockholder loan" and the balance was used by the company to cover Ms. Naleszkiewicz' unpaid filing fees. Tr. 1133. Genesis repaid the stockholder loan to the Naleszkiewiczes on May 17, 1989. Tr. 257; 1125; Committee Exh. 15. The Naleszkiewiczes did not repay The Money Store when they repaid the loan to themselves. *See* Tr. 510.

49. The accountant's monthly compilation report for December 1988 shows that, despite concerns about having money for filing fees, there was no decrease in salaries; in that month Genesis paid officers' salaries of $9,257.50 for Genesis and $10,687.50 for Genesis Southwest. Committee Exh. 25 at 1; Tr. 809-10.

Testimony About the Events on the Filing Dates of January 5 and January 12, 1989

50. The penultimate RSA filing window was January 4-6, 1989. Committee Exh. 12 at 9. Ms. Naleszkiewicz claims that "late in the afternoon" of January 5, the second day of the filing window, her spouse decided that the applications would not be driven to Pittsburgh, but instead would be sent by Federal Express because of bad weather between the Genesis offices and Pittsburgh. Naleszkiewicz Exh. NN at 6; Tr. 278-79. Ms. Naleszkiewicz testified she "believes" she had signed all of the filing fee checks before the decision to use Federal Express was made. Tr. 278; Naleszkiewicz Exh. NN at 7.

51. Vicki Dominique (Dominique) is Ms. Naleszkiewicz' half sister and has known Ms. Naleszkiewicz all of her life. Naleszkiewicz Exh. VD at 2; Tr. 320, 354. She was Genesis' assistant office manager from September 6, 1988 to January 13, 1989. Naleszkiewicz Exh. VD at 1. She was supervised by Wardinski and also reported to Ms. Naleszkiewicz. *Id.*; Tr. 320. Dominique's "main duty was to oversee the process of producing the [RSA] applications . . .." Naleszkiewicz Exh. VD at 1. "Most of the time" she packaged by herself all of the applications that were filed. Tr. 321-22.

52. In her direct case testimony Dominique stated "we prepared the applications on January 5th in the usual fashion." Naleszkiewicz Exh. VD at 2. At the hearing,

however, Dominique was unsure on which day of the January 4-6 filing window the applications were prepared. Tr. 324. She testified that "normally" the applications were "all done . . . by the evening prior to when they were supposed to go" to Pittsburgh and that the applications would be driven to Pittsburgh early the following morning. Tr. 365-66. When asked if her statement "we prepared the applications on January 5th in the usual fashion" meant the applications would be transported on the next morning as usual by car, she replied, "I can't remember." Tr. 368. Dominique was unable to remember the dates of the filing window and whether she packaged the applications on January 4 or 5. Tr. 368-69.

53. After the decision to use Federal Express was made on January 5, Dominique removed the transmittal sheets from the applications. Tr. 281. No backup system was used to replace the transmittal sheets. Tr. 282. Ms. Naleszkiewicz testified that although she knew Federal Express was an "option" for delivering the applications, she never had any discussions about getting proof of delivery in the event Genesis used Federal Express. Tr. 283.

54. In her direct case, Ms. Naleszkiewicz stated she helped pack the applications on January 5. Naleszkiewicz Exh. NN at 5. She testified at the hearing, however, that she did not remember whether she helped pack applications. Tr. 288.

55. In her deposition, Ms. Naleszkiewicz stated that typically the Cell-Cal applications were "left aside to be the first one that went into or the last one that went into" the package and "they might have all been rubber banded together . . .." Tr. 382. At the hearing, she did not "remember that they were packaged separately." Tr. 380, 382.

56. In her written testimony, Ms. Naleszkiewicz stated "[on January 5] [t]he applications were assembled by our staff in three to four boxes and at least one separate package, and taken to the front of the office for loading into the trunk of Wlad's automobile." Naleszkiewicz Exh. NN at 7. At the hearing, however, she testified "[w]hether I saw three or four boxes, five or six boxes, I don't really remember . . .." Tr. 291. She said that by "at least one separate" package she meant "if the . . . boxes were full, then . . . any leftovers would have been put into a smaller, and I believe that those were put into, that there was at least some left over and they were put into the Fed Ex package or something." Tr. 290. She said she remembered there was one package because "Vicki [Dominique] or somebody may have asked where the Fed Ex packs were . . .." Tr. 291. Dominique, however, testified she put all applications in boxes on January 5 and did not recall any smaller packages. Tr. 343. She did not remember packaging any applications in or seeing a Federal Express envelope on January 5. Tr. 328. Ms. Naleskiewicz believes Mr. Naleszkiewicz carried the boxes to the trunk of his car on January 5 but does not remember if she saw him do so. Tr. 288-89.

57. The final RSA filing window was January 11-13, 1989. Committee Exh. 12 at 9. On January 12, the second day of the January 11-13 filing window, Mr. Naleszkiewicz told his spouse he had "decided" that the applications would not be driven to Pittsburgh. Naleszkiewicz Exh. NN at 7; Tr. 294. She testified they discussed this in the morning, but they did not talk about getting proof of filing to replace the transmittal sheets. Tr. 294, 295. Ms. Naleszkiewicz again signed the filing fee checks. *See* Tr. 223; Naleszkiewicz Exh. NN at 7.

58. Dominique testified she again packaged the applications and put them all in boxes. Tr. 343, 371. Dominique did not remember seeing any smaller packages on January 12. Tr. 336. Ms. Naleszkiewicz stated she recalled "there were several separate packages apart from the boxed applications" on January 12. Naleszkiewicz Exh. NN at 7. She testified "I believe again that they were Fed Ex boxes, but I can't remember." Tr. 291. Mr. Naleszkiewicz testified he told an employee to put the Cell-Cal applications into a Federal Express envelope. Tr. 1113-14.

59. Mr. Naleszkiewicz testified that on January 12, he told the employees of the decision to use Federal Express before the transmittal sheets had been attached. Tr. 295. Dominique testified she again took off the transmittal sheets that day. Tr. 335.

60. In her written testimony, Dominique stated that on January 12 "Dr. Naleszkiewicz again loaded the applications into his car." Naleszkiewicz Exh. VD at 4. She testified, however, that she did not remember seeing him do so. Tr. 336.

61. Of 719 applications prepared by Genesis for filing on January 5, 1989, 22 were filed. Naleszkiewicz Exh. VN at 17 n.1. Mr. Naleszkiewicz testified he threw the remaining 697 into a dumpster behind Genesis' office. Tr. 1042. Of 810 applications prepared by Genesis for filing on January 12, 1989, 69 were filed. Naleszkiewicz Exh. VN at 18 n.1. Mr. Naleszkiewicz testified he threw the remaining 741 into the same dumpster. Tr. 1043.

62. Mr. Naleszkiewicz testified he made the decision to throw the applications into the dumpster on January 5 on his way to the Federal Express office. Tr. 1042-43. On January 5, the only applications filed by Genesis were for their client Cell-Cal. Tr. 1121. On January 12, the only applications filed by Genesis were Cell-Cal's and a few others. Tr. 1121. He did not remember if he calculated exactly how much money Genesis had in January 1989, but knew there was enough to cover Cell Cal's applications on January 5, and that there was more money for the last filing. Tr. 1120, 1121-22.

63. Mr. Naleszkiewicz testified that after he sent Cell-Cal's applications by Federal Express on January 5, he drove back to Genesis and threw away the boxes of applications at about eight p.m. Tr. 1043. The same sequence occurred on January 12. Tr. 1043. Both days, he knew there were still employees at the Genesis offices when he threw the applications away. Tr. 1043.

64. Mr. Naleszkiewicz stated that the dumpster he threw the applications into was one Genesis employees walked to to discard their trash and can be seen from the Genesis offices. Tr. 342-43; 371; 372. Mr. Naleszkiewicz testified the dumpster is about five feet high and the boxes of applications weighed 20-25 pounds each. Tr. 1043.

65. Ms. Naleszkiewicz knew that the Commission would be releasing Lottery Notices listing the applications that would be included in the lottery and that at that time his clients would learn that they had not been included on the list. He expected the Lottery Notices to come out approximately six or seven months after the filing windows. He planned to offer his clients some sort of settlement at that time. Naleszkiewicz Exh. VN at 12; Tr. 806. Mr. Naleszkiewicz said that he thought that by the time the Lottery Notices came out he could offer to file two free applications for each application he had failed to file. Naleszkiewicz Exh. VN at 12; Tr. 801-02, 806-07, 1165. There were no lotteries coming up and he had no filing offer in

mind. Tr. 1089. He also thought he might refund the money that had been paid. Tr. 802-03. Mr. Nalezskiewicz said he did not have the money to make refunds and there were no filing windows before the Lottery Lists were released. Tr. 804-05. Mr. Naleszkiewicz did not mention that in May 1989, Genesis repaid $124,000 in stockholder loans made to the company by the Naleszkiewiczes. Committee Exh. 15; Tr. 259, 1125.

Ms. Naleszkiewicz Knew There Were Significant Questions About Whether Applications Were Filed Yet Participated in Refiling the Applications and Seeking Their Inclusion in the Lotteries

66. In her direct case testimony, Ms. Naleszkiewicz stated "I first became aware that there was a problem with the filing of Genesis' applications at about the time my husband was contacted by Al Waddill, a former Genesis broker and employee . . .. Mr. Waddill came to the office and met with my husband at about the time when the FCC released the October 6, 1989 Lottery Notice, which covered the January 4-6 [1989] filing window. They discussed the omission of Mr. Waddill's clients from the lottery notice . . . ." Naleszkiewicz Exh. NN at 8.

67. At hearing, however, Ms. Naleszkiewicz testified that when Waddill came to Genesis, he talked to her about the fact that his clients were not on the lottery list. Tr. 388-89. Waddill "asked me if I knew where the cancelled checks were." Tr. 387. She said she did not know, but "looked in a couple of places where I thought they might have been, and they weren't." Tr. 387. Her spouse was not there when Waddill arrived, but returned shortly. Tr. 387-88. Mr. Naleszkiewicz told his spouse Waddill also had been to the Genesis offices on a prior occasion because "[Waddill] had an advanced copy of the lottery list" and discovered his clients were not on the list. Tr. 386.

68. As early as March 21, 1989, however, Ms. Naleszkiewicz knew a client had raised questions about the January 1989 filings. Ms. Naleszkiewicz testified that Cell-Cal "had contacted Mr. Schuman and they wanted proof that all of their applications had been filed." Tr. 298. On March 21, 1989, she sent a letter to Genesis' general counsel Sheldon Schuman regarding Cell-Cal stating "If Genetti wants to double check on whether or not we really did file for a particular market, for instance, all he has to do is call Mobile Services Division and ask if Cell-Cal . . . is really listed as filed for [the particular market]." Committee Exh. 6; Tr. 298-99. She then provided Schuman, as proof of filing, "[c]opies of all the checks issued to the FCC on behalf of [Cell-Cal] for all Block 3 & 4 filings -- front and back." Tr. 299; Committee Exh. 6. The January 4-6 and 11-13, 1989 filing windows were in Block 4. *See* Committee Exh. 12 at 9; Tr. 300. Mr. Naleszkiewicz conceded that he had the essential information to know which applications had been filed as early as February 1989. Tr. 755-57.

69. Others also knew there were problems, including Genesis' general counsel Sheldon Schuman, Nancy Wardinski, and Genesis' marketing director. Wardinski said she "first found out that . . . some of Genesis' clients may not have been filed when Bob Grand called. . . . I don't believe the lottery list was out yet, and he mentioned that there would be a problem." Tr. 649. Bob Grand was Genesis' director of marketing. Tr. 649. Wardinski believes the call, which she received at Genesis, occurred before the first lottery list came out in October 1989. Tr. 650. She does not know if Grand spoke with Mr. or Ms. Naleszkiewicz. Tr. 651-52. Schuman first learned there was a problem with the January 1989 filings when he received a telephone call from Robert Burka, who said "there appears to be a problem with . . . certain people who were not included in the lottery, and one of them being Waddill's group, and I don't know the circumstances, but maybe you could talk to Wlad . . .." Tr. 867. Burka was Waddill's counsel. Tr. 902. The call from Burka occurred well before October 23, 1989. Tr. 904.

70. Schuman said he called Mr. Naleszkiewicz after talking to Burka, "and I said, you know, there is a problem, and he says well, I don't know anything about it." Tr. 867. Mr. Naleszkiewicz testified he did not remember if Schuman had received a call from Burka. Tr. 1048. Schuman recalled that before the postal inspectors searched Genesis on October 23, 1989, he "was advised" by "somebody at Genesis" that a "significant number" of Genesis applications were not included on the lottery list. Tr. 869.

71. The Lottery Notice for the January 4-6, 1989 filing window was released by the Commission on October 6, 1989. Naleszkiewicz Exh. NN at 8. Ms. Naleszkiewicz said Genesis received it "about a week later" (Tr. 540), and Waddill "had already been there twice by the time we got it." Tr. 541. The Lottery Notice for the January 11-13, 1989 filing window was released on October 20, 1989. Naleszkiewicz Exh. NN at 9. Ms. Naleszkiewicz testified Genesis received the second list "about" October 23, 1989. Tr. 541.

72. Ms. Naleszkiewicz did not remember looking at the lottery lists after they were released (Tr. 389), but later testified she may have reviewed "the computer list we had of all the applications" with Wardinski to see which clients were on the list. Tr. 543. She said she learned "at that time" that Cell-Cal's applications were in fact filed, but "really didn't give it thought." Tr. 543. Wardinski confirmed that she reviewed the two Lottery Notices "to determine which Genesis applications were on each list. Most of the Genesis applications were not on the lists . . .." Naleszkiewicz Exh. NW at 3. Even Mr. Naleszkiewicz stated "[t]he two Lottery Notices made it apparent that the substantial majority of Genesis' client applications were not included." Naleszkiewicz Exh. VN at 15.

73. On October 23, 1989, postal authorities searched Genesis offices. Naleszkiewicz Exh. NN at 10. Ms. Naleszkiewicz was at home at the time but went to the offices after her spouse called her. *Id.* She testified that when she arrived her spouse showed her the affidavit. Tr. 606-07. Committee Exh. 30 is a copy of the Criminal Complaint, search warrant, and affidavit of the inspectors. She then read the affidavit while the postal inspectors were in the room. Naleszkiewicz Exh. NN at 10; Tr. 397. The postal inspectors "were mainly directing their questions to Wlad, but I was hearing them . . .." Tr. 404. They did not question her. Tr. 606.

74. Ms. Naleszkiewicz testified the first person who told her that Mr. Naleszkiewicz had not filed applications for the January 1989 filing windows was "probably someone from the Postal authority." Tr. 389.

75. Wardinski was at Genesis' office on October 23, 1989, and was the first person to see the postal inspectors, who she described as friendly. Tr. 655, 657, 661. She testified one inspector, Randy Willets, "said that they were there because some of Genesis' applications had not been filed, did I know anything more about it? And I said no." Tr. 662. Wardinski was still at the offices when Ms. Naleszkiewicz arrived. Wardinski testified that after Ms. Nalesz-

kiewicz arrived, "she and Wlad talked . . .. I think they called Mr. Schuman." Tr. 658. Wardinski could hear them from her desk. Tr. 659.

76. Mr. Naleszkiewicz testified his spouse never went in his office and he "probably" did not show her the complaint. He said he did not say anything to his spouse, (Tr. 1050) but showed her the complaint after the postal inspectors left and she read it then. Tr. 1051. He said it outraged her "because [Waddill] made all kinds of statements which were totally not true." Tr. 1052. "The one item that sticks out . . . is the amount of money that the partnership collected, which she knows we did never collect anything like this from the partnership." Tr. 1080. Mr. Naleszkiewicz had no specific recollection of anything else in the document that upset his spouse. Tr. 1081. He called Schuman while the inspectors were there. Tr. 861-62.

77. In her written testimony Ms. Naleszkiewicz stated, "When I later reviewed the criminal complaint I believed the whole proceeding was an attempt initiated by Mr. Waddill as a competitor to put us out of business." Naleszkiewicz Exh. NN at 11. Despite the fact she and her spouse later signed a Plea Agreement admitting what had happened, she testified, "I still believe it." Tr. 424. When asked if there was anything in the complaint that substantiated her view that Waddill was trying to put them out of business, she said "[m]aybe not in this statement" (Tr. 426), and referred to actions Waddill took afterwards. *Id.* She did point to "a statement [at p. 10 in the affidavit, Tr. 428-29] that we had collected much more money from the clients than what we actually had when it was he, in fact, who collected a lot of money." Tr. 427. Ms. Naleszkiewicz testified that after she read the affidavit she did not ask her spouse if any of the information in it was true. Tr. 414.

78. Mr. and Ms. Naleszkiewicz met with attorney William Fishman after the search of Genesis' offices. Tr. 448. Ms. Naleszkiewicz stated "Wladimir gave the same explanation to Mr. Fishman as he had given to me. Because of a conflict of interest, Mr. Fishman advised my spouse that he was unable to represent our company in any effort to have the omitted applications included in the . . . lotteries." Naleszkiewicz Exh. NN at 9. She said she went along "probably out of curiosity to see what was being said, what, you know, Mr. Fishman's feelings were on it." Tr. 534.

79. Fishman was skeptical. Tr. 85. He "indicate[d] that there were some difficulties accepting this explanation of events. We did go through some of the documentation with him and probed some of his explanations or theories with him. . .." Tr. 93. "We looked at the bank balances and the checks and so on," which Mr. Naleszkiewicz brought at Fishman's request. Tr. 97. Fishman "expressed my skepticism by probing and testing and questioning rather than saying I'm skeptical." Tr. 97. Mr. Naleszkiewicz "was adamant about his explanation . . . and we were left feeling uncomfortable." Tr. 84.

80. Ms. Naleszkiewicz knew Fishman asked her spouse whether they had looked at canceled checks or bank statements. Tr. 525-26. According to Ms. Naleszkiewicz, her spouse answered "no, he had not sat down and went through all the checks to try to find those particular checks." Tr. 526.

81. On November 9, 1989, and November 22, 1989, Genesis filed with the Bureau petitions to include in upcoming lotteries the applications that Genesis had not filed on January 5 and January 12, 1989. CCB Exhs. 1, 6. After receiving the November 9 petition, the Bureau requested additional information, which Genesis supplied. CCB Exh. 2. Mr. Naleszkiewicz testified he knew when he filed the petitions they contained false statements. Tr. 729.

82. Ms. Naleszkiewicz testified she knew Genesis "was filing something . . . to see if [the FCC] would conditionally put [the applications] into the lotteries." Tr. 533; 537. In her direct case, she stated she "did not participate in the drafting of the Petitions nor did I concern myself with their contents, because I didn't believe they pertained to me. I believe I assisted Nancy Wardinski in checking the lists of applicants for whom Genesis was seeking inclusion but that was the extent of my participation." Naleszkiewicz Exh. NN at 10.

83. However, in a statement prepared in this proceeding as an attachment to her reply to Pacific's opposition to her Section 1.65 amendment and Petition for Waiver, Ms. Naleszkiewicz stated "I did review the final text [of the petitions] only to assure that they were consistent with the facts known to me. I determined that they were." CCB Exh. 12 at 2. At the hearing, Ms. Naleszkiewicz testified "when this was typed up, I didn't explain it right." Tr. 581. She "believe[s]" she wrote the statement. Tr. 582. She testified "[w]hat I reviewed was the final to make sure that . . . everything that went with it was complete. I mean all of the attachments. . .." Tr. 582. She did not "remember sitting down and reading" the petition. Tr. 583. She testified she helped assemble "the attachments that went along with what he was filing . . ." and thinks she helped Wardinski "with the list for inclusion because it had to be our clients minus the ones that . . . were filed." Tr. 529. Wardinski confirmed that Ms. Naleszkiewicz assisted her in confirming which applications were not filed. Naleszkiewicz Exh. NW at 4; Tr. 669-70.

84. When Genesis filed the petitions, it also resubmitted the unfiled applications. Naleszkiewicz Exh. NN at 9-10. Each application contained a $200 filing fee check signed by Ms. Naleszkiewicz. *Id.* Mr. Naleszkiewicz testified that at the time the applications were refiled Genesis had sufficient funds to cover the checks. Tr. 1166.

85. By letter, the Bureau denied both petitions, on November 17, 1989 (CCB Exh. 3, as corrected Nov. 20, 1989, *see* CCB Exh. 4) and December 4, 1989. CCB Exh. 7. Ms. Naleszkiewicz "understood from those letters that there was not enough evidence to include them in the lottery." Tr. 620. Genesis thereafter filed an Emergency Petition for Reconsideration of the Bureau's November 17 letter. CCB Exh. 5. On December 18, 1989, Genesis filed an Emergency Application for Review of the Bureau's December 4, 1989 letter. CCB Exh. 8. Also on December 18, 1989, Genesis filed an Emergency Motion for Stay of the lotteries to be conducted on December 20, 1989. CCB Exh. 9.

86. On December 19, 1989, Genesis filed with the Court of Appeals for the District of Columbia a Notice of Appeal of the Bureau's December 4, 1989 letter. Committee Exh. 33. Mr. Naleszkiewicz testified statements contained in his affidavit in Committee Exh. 33 were not true. Tr. 750.

Ms. Naleszkiewicz' Testimony Concerning Her Understanding of the Plea Agreement

87. On February 8, 1990, Mr. Naleszkiewicz pled guilty to two counts of mail fraud. Naleszkiewicz Exh. VN at 19; Naleszkiewicz Exh. NN-1(a) at 1, 4; Naleszkiewicz Exh. NN-1(e). Mr. Naleszkiewicz stated he did not tell his spouse until February 7, 1990, that he did not file the applications. Naleszkiewicz Exh. VN at 20.

88. Also on February 8, 1990, Mr. and Ms. Naleszkiewicz and Genesis entered into a Plea Agreement (the "Agreement") with the United States Attorney by which they agreed to make restitution to their clients whose applications were not filed. Ms. Naleszkiewicz stated that before they signed the Agreement, the U.S. Attorney "indicated that if a reasonable restitution plan could be developed, they would move to dismiss all counts except two mail fraud counts against Wlad and to support a lenient sentence . . .." Naleszkiewicz Exh. NN at 13. She also stated she advised the attorney representing her and her spouse "that I would do anything that I could to keep Wladimir from going to jail because I knew if he went to jail he would die." Naleszkiewicz Exh. NN at 12. She "offer[ed]" her "potential RSA permit in Kansas #3." *Id.*

89. In his direct case, Mr. Naleszkiewicz stated: "I was advised that negotiating a plea agreement would require a restitution or compensation provision. While this seemed only fair to me, I had no way to assure the court that funds would be available for such purposes. Fortunately my wife had . . . won . . . [the Kansas 3 lottery]. . .. [S]he agreed voluntarily to turn over her license, once it was granted . . .." Naleskiewicz Exh. VN at 18-19.

90. On February 8, 1990, the Naleszkiewiczes appeared in court and Mr. Naleszkiewicz pled guilty. Naleszkiewicz Exh. NN-1(d). Schuman testified he was present and Ms. Naleszkiewicz was not surprised by the plea "because she knew he was going to plead guilty. It was presented to us by the U.S. Attorney that the evidence was so overwhelming that they . . . felt that a defense in his case . . . could not be successful . . .." Tr. 916-17. He testified he first found out that day that Mr. Naleszkiewicz had not filed the applications, Tr. 897, and found out "three to four weeks" before Mr. Naleszkiewicz' deposition in this proceeding that the applications were thrown in the dumpster. Tr. 897-98; 873-74. "[T]o the best of [Schuman's] recollection" Ms. Naleszkiewicz was present when he found this out. Tr. 882; 876.

91. Ms. Naleszkiewicz, along with her spouse, executed the Plea Agreement on February 8, 1990. Naleszkiewicz Exh. NN-1(a) at 27. In the agreement she represented that she was "entering this Agreement freely and voluntarily . . .." Naleszkiewicz Exh. NN-1(a) at 14. She also represented that she had consulted with her attorney, "read this Agreement and carefully reviewed every part of it with my attorney," and understood the Agreement. Naleszkiewicz Exh. NN-1(a) at 27. Her attorney, Steven Merril, represented that he had reviewed the entire agreement with her. *Id.* She also told the judge in court on February 8, 1990, that she had reviewed the Agreement. Naleszkiewicz Exh. NN-1(e) at 9. At the hearing in this case, however, Ms. Naleszkiewicz testified she read the Agreement for the first time "probably after we came home that day [February 8, 1990] or within the next couple of days . . .." Tr. 546. She then admitted she read parts of it the night before signing it. Tr. 546.

92. By signing the Agreement, Ms. Naleszkiewicz "agree[d] that the facts set out in the Statement of Facts are accurate in every respect." Naleszkiewicz Exh. NN-1(a) at 22. The referenced Statement of Facts, which Ms. Naleszkiewicz and her spouse also executed on February 8, 1990, appears at Naleszkiewicz Exh. NN-1(b). It reflects that the amount of the loss to Genesis clients -- based on the number of $200 checks signed by Ms. Naleszkiewicz that were not filed -- was $287,600. Naleszkiewicz Exh. NN-1(b) at 5. Ms. Naleszkiewicz testified, however, that even after signing the Agreement she believed her spouse filed the applications because "[h]is explanation was very reasonable." Tr. 523-24. She did not believe the Agreement (Tr. 602; Naleszkiewicz Exh. NN at 16) and said she thought her spouse signed it because he was under duress and wanted to avoid a maximum sentence. Tr. 548; Naleszkiewicz Exh. NN at 16. She testified she only started doubting her spouse after his sentencing -- which was on January 18, 1991. Tr. 523. She stated "there was a lot of people that believed. I wasn't the only one . . ." (Tr. 524), but admitted the Postal authorities, the U.S. Attorney's Office, and some of the victims did not believe him. Tr. 620-21. She did not know if FCC and Merril believed him. Tr. 619, 621.

93. Ms. Naleszkiewicz stated in her written testimony that "[b]ecause I was never accused of anything, I was not offered a grant of immunity at any time," (Naleszkiewicz Exh. NN at 11) but testified she does not "know what an immunity really is." Tr. 454. The Agreement, however, states "the United States Attorney's Office . . . agrees not to bring criminal charges against NANCY NALESZKIEWICZ for any involvement that she may have had with the crimes outlined in the Statement of Facts . . .." in return for the fulfillment by Ms. Naleszkiewicz of all of her obligations under the Agreement. Naleszkiewicz Exh. NN-1(a) at 19. Moreover, the Agreement in several instances labels her a "defendant." Naleszkiewicz Exh. NN-1(a) at 1, 14, 19. Her understanding of the consequences of not complying with the Agreement are "I guess they could prosecute me, but I really don't know." Tr. 553.

94. By court order, Ms. Naleszkiewicz was directed to comply with the provisions of the Plea Agreement, which include, *inter alia*, a pledge to use all of her present and future assets to make restitution to the victims as provided in the Agreement, and to seek transfer of the Kansas 3 license, if she received it, to a trustee who would in turn sell it to raise funds to compensate the victims. Naleszkiewicz Exhs. NN-1(d); NN-1(a) at 5-8. The Naleskiewiczes must make restitution regardless of whether Ms. Naleskiewicz receives the Kansas 3 permit. Naleszkiewicz Exh. NN-1(a) at 11.

95. In her written testimony, Ms. Naleszkiewicz stated "[a]fter the Plea Agreement was signed . . ., I decided there was no sense in continuing to push the FCC to reinstate the applications." Naleskiewicz Exh. NN at 15-16. On February 15, 1990, she filed a letter withdrawing the Emergency Petition for Review and the Emergency Application for Review filed by Genesis on December 5, 1989 and December 18, 1989, respectively. Naleszkiewicz Exh. NN-2.

Ms. Naleszkiewicz' Failure to File a Timely Notice of Appearance

96. Paragraph 62 of the *HDO* states "[t]he applicant and the parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's rules within 20 days of the mailing of this order by the Secretary." Pacific Exh. 2 at 19. Thus, Ms. Naleszkiewicz was required to file a Notice by December 17, 1990.

97. Fishman has represented Ms. Naleszkiewicz at various stages throughout this proceeding and filed pleadings on her behalf (Tr. 29), including a Consolidated Opposition to the CFL and PNC Petitions on January 29, 1990; a Motion to Strike CFL's Petition on January 29, 1990, and a Reply to CFL's Opposition thereto on February 20, 1990; a Section 1.65 Amendment and Petition for Waiver on March 1, 1990; an Opposition to CFL's Motion for Leave

to File Supplement and Supplement to its Petition on March 15, 1990; and a Reply to PNC's Opposition to Section 1.65 Amendment and Petition for Waiver on March 27, 1990. *See* CC Docket 90-591. Fishman testified he represented Ms. Naleszkiewicz when the *HDO* was issued on November 26, 1990. Tr. 47.

98. Fishman has practiced communications law for 27 years (Tr. 58), including representing the Commission in U.S. Courts of Appeals. Naleszkiewicz Exh. WF at 1. He has represented Genesis, its related entities, Mr. Naleszkiewicz, and Ms. Naleszkiewicz in FCC matters for more than six years. Naleszkiewicz Exh. WF at 2.

99. The contact information on Ms. Naleszkiewicz' Kansas 3 application lists her home address, 9327 Old Mount Vernon Road, Alexandria, Virginia 22309. ALJ Exh. 1, which includes a blank Notice of Appearance form, is mailed by the Commission's Dockets Branch with Designation Orders. Tr. 626-27. Although Mr. Naleszkiewicz testified the *HDO* was sent to his wife at their home (Tr. 1066), Ms. Naleszkiewicz does not remember receiving either an official copy of the HDO or the form Notice from the Commission. Tr. 626-27. Fishman never asked Ms. Naleszkiewicz if she received a copy of the *HDO* from the Commission, because "I don't think there is any dispute that she did." Tr. 52-53.

100. On November 26, 1990, Ms. Naleszkiewicz received a facsimile copy of the *HDO* from Fishman. Naleszkiewicz Exh NN at 18; Pacific Exh. 2. She "did not understand" the *HDO* (*id.* at 19), and "did not recall having specifically understood the text of par. 62 of the *Designation Order* and was not aware until late in January [1991] that that paragraph imposed a December 17, 1990 filing deadline on the notice of appearance . . .." *Id.* at 21. She testified "the substance of it, I probably was not very concerned about." Tr. 557. She could not remember if Fishman advised her orally that she had to file a Notice. Tr. 482.

101. Fishman did not recall any conversations with Ms. Naleszkiewicz between November 26, 1990 and December 7, 1990, the date on which he sent her a letter stating he could not represent her. Tr. 57. Ms. Naleszkiewicz testified, however, that Fishman may have told her before December 7 that he could not represent her because of a conflict. Tr. 557; *see* Tr. 559.

102. On November 28, 1990, Fishman sent Sheldon Schuman a copy of the *HDO* and Part 1 of the Commission's Rules. Naleszkiewicz Exh. WF at 4. Schuman received these materials that day (Naleszkiewicz Exh. SS at 1-2), and testified he "read portions of" the *HDO*. Tr. 819. He did not look at the Rules Fishman sent him. Tr. 847-48. Ms. Naleszkiewicz also sent him a copy of the Rules. Tr. 847. Schuman has practiced law for 27 years and has been General Counsel to Genesis since its inception. Naleszkiewicz Exh. SS at 1; Tr. 889, 854; Committee Exh. 2 at 3. He previously represented Genesis in connection with preparing and filing with the Commission petitions to include MSA applications in lotteries and other matters. Tr. 856-57; 893; 912.

103. On December 7, 1990, Fishman sent a letter to Ms. Naleszkiewicz stating, "As I have indicated to you previously, as a result of potential conflicts of interest . . . we will be unable to represent you in this hearing." Naleszkiewicz Exh. WF-1 at 1. The letter enclosed the Bureau's Notice and the Chief ALJ's November 30, 1990 *Order* setting dates for the prehearing conference and hearing. *Id.* The *Order* stated: "All parties are put on notice that they are expected to be fully cognizant of Part I of the Commission's Rules and Regulations concerning Practice and Procedure." *Id.* at 3. Fishman sent a copy of the letter, with enclosures, to Schuman. *Id* at 2, 4.

104. Fishman stated he withdrew as counsel because the *HDO* "led [him] to conclude that [he] could no longer advocate Ms. Naleszkiewicz' position that she knew nothing about and had not participated in any improper or unlawful activities because to do so could simultaneously require us to advocate that the non-included applications had indeed been properly and timely tendered to Federal Express for filing at the FCC." Naleszkiewicz Exh. WF at 2-3. At the hearing, however, he was unable to recall why he felt in December 1990 there was a conflict (Tr. 57), and, in view of the fact that Mr. Naleszkiewicz' guilty plea occurred over nine months earlier, some other reason must have existed.

105. The December 7 letter advised Ms. Naleszkiewicz "[y]our counsel should file a Notice of Appearance at the FCC as provided in Par. 62 of the . . . Designation Order." Naleszkiewicz Exh. WF-1 at 1. Ms. Naleszkiewicz testified she "did not pay attention at all" to this language. Tr. 481. Although the letter states Fishman already had informed her he would not be able to represent her, she said after she received the letter she was "upset that I didn't have any lawyer to represent me" and only focused on that part of the letter. Tr. 559.

106. The December 7 letter also stated Fishman was "available, on a limited and background basis, to assist the counsel you have retained to represent you in this matter . . .." Naleszkiewicz Exh. WF-1 at 1. Fishman stated "[a]bout this time I discussed the issue of substitute counsel with Ms. Naleszkiewicz on the telephone, and she indicated that she would turn to [Schuman]." Naleszkiewicz Exh. WF at 3. He testified Schuman "was the most likely person to step into that role." Tr. 43.

107. Schuman, who received the December 7 letter, the November 30 *Order*, and the Bureau and Pacific Notices of Appearance by facsimile on December 12, 1990 (Naleszkiewicz Exh. SS at 1; Pacific Exh. 13), testified he believed the reference in the December 7 letter to "counsel you have retained" did not refer to him (Tr. 840; 842-43), and said he "didn't represent [Ms. Naleszkiewicz] in connection with this particular case until I was officially retained." Tr. 822-23. According to Schuman, he and Ms. Naleszkiewicz "orally entered a retainer arrangement" on January 26, 1991. Naleszkiewicz Exh. SS at 3.

108. Ms. Naleszkiewicz called Schuman and asked him to represent her "[p]robably sometime after receiving the [December 7] letter." Tr. 566. She did not recall exactly when this contact occurred, but stated "it seems like mid to late December . . .." Tr. 560. Schuman stated he did not know until early January 1991 "that Mrs. Naleszkiewicz wished to retain me and wanted me to appear on her behalf." Naleszkiewicz Exh. SS at 6.

109. With regard to his offer to "assist the counsel you have retained" Fishman testified he expected to tell Schuman "things of a mechanical and limited nature." Tr. 43-44. Fishman knew Schuman "had no experience practicing before the FCC and would need some help of a technical, nonsubstantive nature in preparing for the hearing." Naleszkiewicz Exh. WF at 3. He testified he "believe[s]" he had "three or four discussions" with Schuman between December 7, 1990 and January 30, 1991, but did "not have a very clear recollection of the kinds of things we discussed. . ." with Schuman. Tr. 44; 79. He failed to

describe the substance of his calls with Schuman in his daily diary, although he did bill Ms. Naleszkiewicz for the calls. Tr. 44; Naleszkiewicz Exh. WF at 4.

110. Fishman testified that he knew a Notice was required to be timely filed and that he knew at the time he sent the December 7 letter the time for filing the Notice was running, but that he himself never ascertained the date it was due. Tr. 58; 59; 75. He did not remember if he discussed with Schuman whether a Notice was due or the date it was due. Tr. 45-46.

111. Although he was her counsel on November 26, 1990, according to Fishman, he also did not tell Ms. Naleszkiewicz the time for filing the Notice was running. Tr. 75. Fishman stated "it is possible" he told Schuman he needed to file a Notice (Tr. 60), but "ha[s] no recollection" of discussing either the Notice or the deadline for filing it with Schuman or Ms. Naleszkiewicz. Tr. 61; *see* Tr. 76. Fishman said "[a]s far as I was concerned, [Schuman and Ms. Naleszkiewicz] had been advised, that, as required in paragraph 62, they had to enter an appearance." Tr. 47.

112. By December 12, 1990, each of the other parties had filed a Notice and served the Notice on Fishman. Pacific Exh. 4 at 2; Pacific Exh. 6 at 2; Pacific Exh. 7 at 2. Fishman forwarded copies of each Notice to Schuman. Naleszkiewicz Exh. WF at 4; *see* Pacific Exh. 13; Tr. 834-35.

113. In his direct case testimony, Schuman stated that after December 12, 1990, he had telephone conversations with Ms. Naleszkiewicz and Fishman or his colleagues "concerning the upcoming hearing and whether I would represent Mrs. Naleszkiewicz . . .." Naleszkiewicz Exh. SS at 2. However, at the hearing he could not "remember exactly what was said when" (Tr. 826), although he recalled talking with Fishman about procedural matters -- but never about the Notice requirement. Tr. 830; 846. He could not "recall specifically what we talked about." Tr. 846. He also said, "[W]e talked substance." Tr. 824.

114. Regarding the December 1990 - January 1991 period, Ms. Naleszkiewicz stated ". . . I had no substantial funds at that time . . .." Naleszkiewicz Exh. NN at 24; *see also* Pacific Exh. 8 at 1. Genesis also was having financial troubles. Tr. 563. Indeed, she said "we just had no money," and they faced foreclosure on their home. Tr. 563. She discussed with relatives the possibility of obtaining money, but said these conversations did not specifically pertain to prosecuting her Kansas application. Tr. 563-64.

115. On January 3, 1991, Ms. Naleszkiewicz wrote a letter to Schuman stating "I would like to ask you to represent me during the FCC administrative proceedings." Pacific Exh. 8 at 1. She stated, "I need a counsel who has to formally notify the Commission of his intention to appear on my behalf . . .." *Id.* at 2. Ms. Naleszkiewicz stated she ". . . assumed . . . too casually . . . that my new counsel would deal with the content and specific requirements of the *Designation Order*. " Naleszkiewicz Exh. NN at 19.

116. Schuman said he had no discussions with Ms. Naleszkiewicz about who would represent her if he did not, because he "had made up my mind that I would try, I would help them out and not let them go down the tube . . .." Tr. 883-84. He did not tell Ms. Naleszkiewicz this. Tr. 884. Ms. Naleszkiewicz testified, "Schuman . . . may have said I need money before I could represent you . . .." Tr. 564. Schuman knew she was concerned about representation and very upset about the upcoming sentencing of her husband (Tr. 886; 892-93) and that she "was having financial problems at that time and did not have available cash to retain an attorney."Naleszkiewicz Exh. SS-4 at 3. However, after he received her January 3, 1991 letter he told her he could not represent her until he received a retainer. Naleszkiewicz Exh. SS at 2. Schuman testified he told her the proceeding could cost as much as $100,000 in legal fees. Tr. 824.

117. In mid-January 1990, Bureau counsel contacted Fishman and told Fishman that Ms. Naleszkiewicz had not filed a Notice. Tr. 77; Naleszkiewicz Exh. WF at 4. Fishman "told [Bureau counsel] that it was out of my hands and I simply did not know what her plans were." Naleszkiewicz Exh. WF at 4. He does not remember if he thereafter contacted Schuman. Tr. 78.

118. Schuman testified he knew from Fishman's December 7, 1990, letter and from his own experience that a Notice had to be filed, but not that there were any time constraints. Tr. 845. "After I was retained . . . I knew I had to file a Notice of Appearance, and I had a copy of the rules which were provided to me by Ms. Naleszkiewicz." Tr. 849.

119. Schuman testified he did not know of the 20-day requirement until "right before I entered my appearance, and I went and looked at the rules." Tr. 832. This was "[s]ometime shortly before the pretrial conference" on January 30, 1991. Tr. 832. He called Ms. Naleszkiewicz, "hoping that she may have complied with it." Tr. 851. She told him she "was unaware that . . . this requirement existed, and that's when I filed the [Notice] based on what she told me." Tr. 833.

120. Ms. Naleszkiewicz asserts as "persuasive grounds" for her failure to file that her spouse's sentencing was coming up and "his criminal counsel had advised us that he could be sentenced up to 12 to 18 months in prison." Naleszkiewicz Exh. NN at 21. On January 15, 1991, Ms. Naleszkiewicz wrote to the presiding judge in her husband's criminal case. Naleszkiewicz Exh. NN-9. The sentencing had been postponed several times. Tr. 1053. Although, Mr. Naleszkiewicz testified, no one discussed postponement with him. Tr. 1054-55. Genesis' clients whose applications were not submitted did file a statement, which he received, in which they specifically sought deferral of sentencing until the Commission acted on Ms. Naleszkiewicz' Kansas 3 application. Committee Exh. 36 at 2; Tr. 1064. Mr. Naleszkiewicz' sentencing occurred on January 18, 1991. He was sentenced to four months of home confinement with work release and fined $5,000. Naleszkiewicz Exh. NN-1(h).

121. Ms. Naleszkiewicz also stated she was under medication at the time the Notice was due (Naleszkiewicz Exh. NN at 23), which she said she "was taking . . . because my husband was going to have his sentence." Tr. 481. However, Ms. Naleszkiewicz also testified to extensive and continuing medication treatment. Tr. 463-76.

122. At the prehearing conference in this proceeding on January 30, 1991, Schuman stated "inadvertently, I did not file a notice of appearance." Tr. 3. On the same day, Schuman filed a Notice of Appearance (Naleszkiewicz Exh. SS-2) and a Motion to Enter Appearance Late, Request to Appear at the Hearing and to Present Evidence on Behalf of Nancy Naleszkiewicz (the Late Motion). Naleszkiewicz Exh. SS-3. The Late Motion stated Ms. Naleszkiewicz "always intended to appear" but she was "unaware" the Rules required her to notify the Commission of her intent to appear within 20 days of the *HDO*. *Id.* at 1-2. She also

stated she was "pre-occupied" with helping her husband in his sentencing and had "just retained" Schuman as counsel. *Id.* at 2.

123. Fishman "resumed" representation of Ms. Naleszkiewicz on April 24, 1992, having "determined that conflict of interest considerations no longer preclude my representing Mrs. Naleszkiewicz in this proceeding." Naleszkiewicz Exh. WF at 5-6.

124. During discovery in this proceeding, Mr. Naleszkiewicz provided his wife with answers to interrogatories directed to her. Committee Exh. 37; Tr. 243-45; 491-92. Schuman testified Ms. Naleszkiewicz had no difficulty explaining her functions and Mr. Naleszkiewicz would not have to tell her what she did and did not do. Tr. 889.

CONCLUSIONS

Issues 1 and 4: Nancy Naleszkiewicz Was Aware of, and Involved in, Genesis' Failure To File RSA Applications With the Commission

125. Genesis purportedly prepared 719 applications for frequencies in the cellular telecommunications radio service to be filed during the January 4 to 6, 1989 filing window and 810 applications for frequencies in the cellular telecommunications service for filing during the January 11 to 13, 1989 filing window. When the Commission released, on October 6 and 20, 1989, the lists of applications filed on those dates, only 22 Genesis applications were on the list for the first January 1989 filing window and 69 for the last January 1989 filing window. On November 9 and 22, 1989, Genesis petitioned the Commission to include in the lottery the 1,438 applications of Genesis clients that had not been put on the Commission's list of applications filed. Genesis represented to the Commission that it had filed its clients' applications and suggested that the Commission had lost them. On December 5, 1989, Wladimir Naleszkiewicz, President of Genesis, and Genesis were indicted in Federal District Court in Alexandria, Virginia for sending letters to Genesis clients in which Genesis claimed that their applications had been filed, when they had not, and for making false statements to the United States Postal Inspection Service. On February 8, 1990, Mr. Naleszkiewicz pled guilty to two counts of mail fraud stemming from the untruthful letters.

126. Genesis' failure to file the applications of its clients was brought about because it did not have the money to pay the $200 filing fees. Ms. Naleszkiewicz maintains that she was not involved with the finances of Genesis and that she was unaware that Genesis did not have the money to pay the fees. It is her position that she knew nothing about the financial affairs of the business or Genesis' failure to file 1,438 cellular applications. She claims only to have "performed specific and routine administrative tasks at Genesis." While she admits that she was involved in the filing of applications for cellular licenses, even to the extent that she signed all the filing fee checks, she claims she never inquired about whether there were enough funds. These claims have not been established and are contrary to the record as a whole.

127. When Ms. Naleszkiewicz began working at Genesis she already understood the application process for cellular frequencies from past positions she had held. She has always been involved in Genesis' financial affairs and at the hearing she exhibited a thorough understanding of Genesis' financial recordkeeping systems. Ms. Naleszkiewicz concedes that she is responsible for the accounts payable, personnel matters, Workmen's Compensation filings and employee insurance at Genesis. She also keeps the books on the alliances formed among applicants who pool their interests for the lottery. And starting in April 1987, when she became President of Genesis for a number of months while her spouse was ill, she wrote payroll checks -- which she does to this day -- and commission checks to the sales staff.

128. Ms. Naleszkiewicz said her spouse was the only person who reviewed and was informed about Genesis' financial status and bank balances. But she knew how many bank accounts Genesis had and what their purposes were. She knew why the accounts were established and often when there was a problem with an account, Ms. Naleszkiewicz' testimony indicates that she was aware of it. Genesis' memoranda indicate that Ms. Naleszkiewicz received a copy of each element of the client's file, including a copy of each check received from the client. Although she claims that she eventually threw her copies away and that she "put a stop" to receiving them, she cannot remember when she did these things. Ms. Naleszkiewicz also received monthly statements from Genesis' accountant which summarized Genesis' financial condition and indicated the balances of the various Genesis accounts. Ms. Naleszkiewicz at first admitted to receiving the monthly accounting statements only after she became President of Genesis in February 1990 but during questioning at the hearing she conceded she knew the statements were sent each month and that she "sometimes" received them before she became president. These statements required only common sense and a knowledge of the company's business to understand them, according to Genesis' accountant. Genesis also received monthly statements from the bank for each of its accounts. The statements listed by number the checks that cleared the previous month.

129. Ms. Naleszkiewicz signed virtually all filing fee checks and she knew that the money came from Genesis' disbursement account. Nevertheless, Ms. Naleszkiewicz claims she did not know that Genesis did not have enough money to file the January applications. In light of the information about the accounts that was available to her, that claim cannot be credited. Even if Ms. Naleszkiewicz did not rely on the account information which she had available, she could have asked Mr. Naleszkiewicz. It is improbable that she did not know there were insufficient funds to file the January 1989 applications. In fact when she wrote checks for payroll or bills, Ms. Naleszkiewicz claims she did check to see if there was enough money in the account. Her deposition testimony exhibits a knowledge of the fee accounts. At her deposition, Ms. Naleszkiewicz said the accounts holding the fees were closed in February or March 1989, which coincided with Mr. Naleszkiewicz' testimony; at the hearing, when her position was that she knew nothing about the accounts, she could not remember. One of the hallmarks of Ms. Naleszkiewicz' oral hearing testimony was that she could remember matters that fit her position but could not remember those which did not, even though she often had testified about the subject matter of the question at her deposition.

130. Ms. Naleszkiewicz was fully aware of the problem that filing fees had presented to Genesis. In the early summer of 1988, she knew that Genesis' former marketing director had not told clients there would be filing fees. In mid-July 1988, charts were prepared that showed which

clients owed filing fees. Mr. Naleszkiewicz said he knew that Genesis might have financial problems when he saw the charts. Ms. Naleszkiewicz claims she never saw the charts until discovery in this proceeding but the record reflects that she knew they were prepared and that she knew following their preparation that calls were made to Genesis clients to collect the fees owed. She knew that she and her spouse had not paid their fees. And she was aware that Genesis had filed applications for clients when they had not paid their fees. She also knew that Genesis had been unable to collect some of the fees.

131. Mr. Naleszkiewicz claims that he purposely did not tell Ms. Naleszkiewicz about the financial problems of the company. But he did tell her in November 1988 that money was getting tight at the company. Mr. Naleszkiewicz claims that by late 1988, he had lost a "feel" for how much money was in the Genesis accounts. Nevertheless, he knew that Genesis did not have enough money to pay the filing fees for its clients during the January 1989 filing windows. The evidence indicates that there was not enough money in the disbursement account to cover the filing fees for applications filed in the December 14-16, 1988 window. The bank statement for December 1988 for Genesis' escrow disbursement account shows 591 returned filing fee checks of $200 each for a total of $118,200.

132. On December 14, 1988, the Naleszkiewiczes jointly prepared a credit application to borrow $150,000 from The Money Store. They represented in an affidavit attached to The Money Store note that the loan would be used for operating expenses for Genesis. There is a discrepancy in the Naleszkiewiczes' account of Ms. Naleszkiewicz' knowledge and understanding of the purpose of The Money Store loan. At Mr. Naleszkiewicz' deposition he said he told Ms. Naleszkiewicz that the money was needed to pay filing fees. But at the hearing he testified that he had no recollection of telling Ms. Naleszkiewicz that the money was actually needed for the disbursement account to pay filing fees. Ms. Naleszkiewicz also testified that she did not know the money was needed for filing fees but the record reflects that she was not telling the truth even if her spouse did not tell her the money was for filing fees. The entire amount of the loan from the Money Store was deposited into the Genesis escrow disbursement account on December 27, 1988. It was the account used to pay filing fees. Ms. Naleszkiewicz endorsed The Money Store check with "Pay to the order of The Genesis Enterprises, Inc. Escrow Disbursement Acct." Moreover, Ms. Naleszkiewicz concedes she knew some of the money would be used to pay her filing fees. $118,000 of The Money Store loan became a loan from the Naleszkiewiczes to Genesis and the balance was used to pay Ms. Naleszkiewicz' unpaid filing fees. The $118,000 amount equalled almost exactly the shortfall in the escrow disbursement account for December 1988. Knowing that, could not have helped but raise questions for Ms. Naleszkiewicz about where the funds would come from to make the January filings.

133. Ms. Naleszkiewicz also gave every indication that she knew there was a problem with Genesis' disbursement account in December 1988. She remembered that the bank called Genesis employee, Nancy Wardinski, and that Wardinski called Mr. Naleszkiewicz when they were visiting her family in West Virginia in December of 1988. But she could not remember exactly when that was because she could not, she said, remember much about the last of 1988. With all these warning signs, Ms. Naleszkiewicz representation that she signed all the filing fee checks for the January 1989 applications without raising any questions about the availability of money to pay the checks and without checking the Genesis records is improbable.

134. Ms. Naleszkiewicz' half-sister, Vicki Dominique, who was Genesis' assistant office manager, collated and packed the applications for filing. She was supervised by Nancy Wardinski, an administrative assistant. They both reported to Ms. Naleszkiewicz. Dominique testified about what was normally done to prepare clients' applications for filing. In her written testimony she said the applications were prepared in the usual fashion for the January 1989 filing windows. At the hearing she was not nearly as certain. She could not remember how the applications were to be sent to the Commission, and she could not remember the dates of the filing window. Her testimony indicates that the usual application filing procedures were not followed. For example, Dominique remembered that she was told to remove the transmittal sheets from the applications that were always used to provide proof of filing to Genesis clients. Ms. Naleszkiewicz also confirmed Dominique's view that normal procedures were not followed. She said that Federal Express was considered as an "option" for sending the applications and there was no discussion about getting proof of delivery, which Genesis routinely provided its clients.

135. Genesis did file applications for Cell-Cal during the January 1989 filing windows. In 1987, Genesis had not filed Cell-Cal's applications and was bound by a settlement agreement with Cell-Cal to make good on those applications in future filing windows. In the spring and summer of 1987, when Ms. Naleszkiewicz was President of Genesis due to her spouse's illness, she participated in negotiating a settlement with Cell-Cal in which Genesis would file applications for Cell-Cal at Genesis' expense. Thus, she was familiar with the necessity of filing Cell-Cal's applications. She undoubtedly knew that Cell-Cal would want proof that Genesis had fulfilled its obligation.

136. Ms. Naleszkiewicz in her written testimony said she helped pack the applications for the January filing windows but at the hearing she said she could not remember whether she did. At her deposition she said the Cell-Cal applications were packed separately, either first or last in the package but at the hearing she said she did not remember that they were packed separately. In her written testimony she said the January 5 applications were put into three or four boxes with at least one separate package but at the hearing she said she could not remember how many boxes she saw. She said the reference to a separate package in her written testimony only meant that if the boxes were full they were put into a smaller Federal Express package or "something."

137. For the second January filing window, Mr. Naleszkiewicz said he told Ms. Naleszkiewicz on the morning of the second filing day that the applications would not be driven to Pittsburgh as they usually were. Ms. Naleszkiewicz proceeded to sign the checks but maintains they did not discuss getting proof of filing to replace the transmittal sheets that were removed. Dominique in her written testimony said she saw Mr. Naleszkiewicz load the applications in his car but at the hearing, she said she could not remember seeing him do so. Mr. Naleszkiewicz said he threw the applications he did not send by Federal Express in a dumpster in full view of the office while people were at work. He claims he lifted the 25 pound boxes over five feet in the air to throw them in the dumpster.

138. Ms. Naleszkiewicz argues that she had no knowledge of Mr. Naleszkiewicz' plan to not file the applications for the January 1989 filing windows. Nevertheless, she knew that the usual procedures were not being followed. She knew the Cell-Cal applications were packed separately and she knew the usual steps were not being taken to provide assurance to Genesis' clients that the applications had been filed. Never before had Genesis followed the procedures it did in January 1989. She also knew or should have known that the disbursement account did not hold sufficient money to make the filings. At the hearing, Ms. Naleszkiewicz had a memory lapse about all the details of what happened in January 1989, although earlier, at her deposition, she was able to remember more of what had happened.

139. Mr. Naleszkiewicz testified that in February 1989, Genesis' accounting and bank records demonstrated that the applications had not been filed. Ms. Naleszkiewicz received accounting reports and had access to the bank statements and checks which demonstrated that Genesis had not filed most of the January 1989 applications. She admits that in March 1989, she examined the cancelled checks for Blocks 3 and 4 (Block 4 included filing windows January 4-6 and 11-13, 1989) for Cell-Cal, who had asked Genesis counsel, Sheldon Schuman, for proof that their applications had been filed. Ms. Naleszkiewicz sent Mr. Schuman front and back copies of Cell-Cal's filing fee checks. The next incident involving the January 1989 filings that arose, also involved Ms. Naleszkiewicz. Al Waddill, who had been a Genesis broker and employee, came to see Mr. Naleszkiewicz on October 6, 1989 to discuss the omission of his clients from the lottery list. Ms. Naleszkiewicz testified that Mr. Waddill asked her if she knew where the cancelled checks for the filing fees were; she searched for them and could not find them. She also knew that this was his second visit about the matter.

140. After the lists of applications accepted for the lottery were released in October 1989, Ms. Naleszkiewicz said she did not look at them. But her testimony shows she and Wardinski checked the Genesis computer list of applications with the Commission's lottery lists. Ms. Naleszkiewicz found that Cell-Cal's applications were on the Commission's list and Wardinski said they confirmed that most of the January 1989 applications for Genesis' clients were not on the Commission's list. Ms. Naleszkiewicz said she "really didn't give it thought."

141. On October 23, 1989, the postal inspectors searched Genesis offices and Ms. Naleszkiewicz was summoned from her home to the office. She claims, falsely as the evidence shows, that this was the first time she heard the claim that applications had not been filed. Ms. Naleszkiewicz read the affidavit and complaint of the postal inspectors and the only aspect of the affidavit, which recounted the failure to file the applications, that she disagreed with was how much money Genesis received. When Mr. Naleszkiewicz went to see William Fishman, his lawyer, Ms. Naleszkiewicz went along with him. At that meeting they examined Genesis' bank balances and checks. From those records, as Mr. Naleszkiewicz testified, it was evident that Genesis had not filed most of its clients' applications in January 1989.

Issues 2 and 4: Nancy Naleszkiewicz Was Aware That The Requests Made To The Commission Were Inaccurate and She Participated in The Filings.

142. On November 9 and 20, 1989, Genesis requested that the Commission include in the cellular lotteries the applications that Genesis had not filed. Mr. Naleszkiewicz testified in this proceeding that he knew the statement of facts asserted in the filings was false. Ms. Naleszkiewicz said she knew about the filings. She had gone with Mr. Naleszkiewicz to urge Mr. Fishman to make the filings when he refused to do so. But she claims in her written testimony that she did not participate in drafting them, nor, she said, did she concern herself with their contents. That is not an accurate statement. She checked the computer lists of Genesis clients to determine which applications needed to be included. And, at one point in this proceeding, she said in a declaration that she reviewed the final text of the filings "to assure that they were consistent with the facts" known to her. She said they were. When this statement was called to Ms. Naleszkiewicz' attention, she said she could not remember reading the petitions. She believes she wrote the statement but what she meant was merely that she checked to make sure the attachments were all there. Ms. Naleszkiewicz did not explain how she could know if the attachments were there if she was unfamiliar with the text of what was being argued. In addition to assisting with the preparation of the actual petitions, Ms. Naleszkiewicz signed new fee checks for each of the applications, which were also submitted with the requests. She knew that Genesis then had sufficient money to cover the checks. Ms. Naleszkiewicz found out from letters sent to Genesis by the Commission that the requests were denied.

143. Mr. Naleszkiewicz said that additional filings made with the Commission and the court also contained untruthful statements. Ms. Naleszkiewicz was involved in making the requests; it is evident she had or could have had information to correct the filings. There is little question that she was party to the untruthful statements. As has been recounted in the findings of fact, she knew that the applications had not been filed and she, therefore, knew that Genesis' representations were not truthful. Moreover, Ms. Naleszkiewicz was under an obligation to apprise the Commission of the truth since she was at all times an officer and owner of Genesis.

Issue 5: Nancy Naleszkiewicz was aware of her obligation to file a timely notice of appearance and she lied about her awareness.

144. Ms. Naleszkiewicz was required by the HDO to file a Notice of Appearance in this proceeding by December 17, 1990. The HDO provided, with standard language that reflects the Commission's rules, that written notices of appearance were to be filed within 20 days of the mailing of the HDO. Ms. Naleszkiewicz' counsel, Sheldon Schuman, represented at the prehearing conference held on January 30, 1991 that while a notice had not been filed by Ms. Naleszkiewicz, her failure to file was inadvertent. A notice of appearance was filed on January 30, 1991. Ms. Naleszkiewicz represented in her request to have her late request accepted that she was "unaware" of the notice of appearance requirements of the Commission's rules, that she always intended to appear, that she had just retained counsel, and that she was "pre-occupied" because of the sentencing hearing of her husband scheduled for January 18, 1991.

145. The evidence submitted by Ms. Naleszkiewicz does not establish that she was unaware of the need to file a notice of appearance or that she was unaware that a timely filing was due before January 30, 1991. On November 26, 1990, when the HDO was released, her counsel, William Fishman, immediately sent her a facsimile of the HDO. On December 7, 1990, Fishman wrote to Ms. Naleszkiewicz

and alerted her to the need to file a notice of appearance and told her which paragraph in the HDO required the notice of appearance. The Commission also sent Ms. Naleszkiewicz a copy of the HDO and a notice of appearance form. In addition, the Commission sent along with the HDO the relevant rules. Ms. Naleszkiewicz admits she received the HDO, the letter from Fishman, and Mr. Naleszkiewicz' testimony indicates that she received a copy of the HDO from the Commission. Moreover, there is no doubt that Ms. Naleszkiewicz did know a notice of appearance had to be filed because, on January 3, 1991, she wrote to Sheldon Schuman, the lawyer who represented her at the prehearing and ultimately filed the notice of appearance for her, and told him she needed a lawyer to file an appearance on her behalf. It is unbelievable, if Ms. Naleszkiewicz knew she needed to file a notice of appearance, that she would not have also known that it was due within 20 days of the mailing of the HDO since the sentence in the HDO which provides that a notice must be filed also provides for when it was due.

146. In the face of all this evidence which belies her representations that she was "unaware" of the need to file timely notice, Ms. Naleszkiewicz said that when she received the HDO she "probably was not very concerned about" the substance of the order. When she received the December 7, 1990 letter from Mr. Fishman telling her she needed to file a notice of appearance, Ms. Naleszkiewicz said she "did not pay attention" to what he said. Ms. Naleszkiewicz testified that she was only concerned that Mr. Fishman had refused to be her lawyer. Ms. Naleszkiewicz also claims that she does not recall if she understood the text of the paragraph requiring a notice of appearance within 20 days. If that were the case, and there is no reliable evidence that it was, she could have asked either Mr. Fishman or Mr. Schuman what was meant by the Commission's order. Both of them spoke with her before the due date.

147. Ms. Naleszkiewicz has not demonstrated that her representations to the Commission about why she did not file a notice of appearance until January 30, 1991 were truthful. There is evidence she was made aware of the requirement by William Fishman and, although she claims she did not pay attention to what Mr. Fishman told her, her January 3, 1991 letter to Sheldon Schuman and her contacts with Fishman and Schuman demonstrate she was aware of her obligation to file a notice of appearance. The issue is not what her motive was for not filing on time, the issue is whether she told the truth when she sought to have her late notice of appearance accepted. Her motive to distort her knowledge of the requirement is evident. She wanted to participate in the proceeding and be excused for violating the rules. The record evidence does not establish that Ms. Naleszkiewicz was being truthful when she told the Commission she was unaware of her obligation to file a notice of appearance.

Ms. Naleszkiewicz' Demeanor

148. Ms. Naleszkiewicz' written and oral testimony were calculated to have the Commission believe she insignificant in Genesis' business and she performed only ordinary clerical tasks. In order to believe her account of her role at Genesis, the Commission would also have to believe that she was always given direction before she acted and that she never formed independent conclusions about the business affairs of a company that she was an officer of, owned, and profited from. During the hearing, however, her appearance contradicted her claim. She appeared intelligent and able to understand complex questions. When it served her interest during the hearing, she was able to explain in detail how Genesis operated. It may be that the jobs originally assigned to her were clerical in nature but when Mr. Naleszkiewicz was operated on for a heart ailment in April of 1987, there apparently was no doubt in his or her mind that she could operate the business. By her own description, when she became president, she acted resourcefully. Ms. Naleszkiewicz explained that she immediately went from department to department at Genesis to assess what each person was doing and then began to supervise the day-to-day operations. In February 1990, after Mr. Naleszkiewicz pled guilty to mail fraud, Ms. Naleszkiewicz again became President of Genesis and from then to now she has supervised the day-to-day operations of the Naleszkiewiczes' businesses. She now is responsible for all business decisions. Ms. Naleszkiewicz attempted to give the impression that the finances of Genesis were beyond her concern and knowledge. However, when she was asked what was inaccurate in the written complaint of the postal inspectors, the only item she could point to was the amount of revenue assigned to Genesis' application business. She operated the business in her spouse's absence in 1987. When asked about the fiscal status of the business during that time, she was able to immediately provide an assessment. It was one she characterized as drawing "fairly good" revenue. For someone who purportedly was not involved in the finances of Genesis, it is significant that depictions of the financial condition in the legal documents would be uppermost in her mind. When legal difficulties arose over Genesis' failure to file applications for Cell-Cal, she participated in settlement discussions and negotiations.

149. Ms. Naleszkiewicz also overstated her preoccupation with a fatal illness of a family member. She claims that she spent every evening in October and November 1988, when Genesis' fiscal health was deteriorating, travelling to a hospital in Baltimore. There is no objective evidence that she did and her own testimony shows that she spent part of October 1988 in Cannes, France.

150. Ms. Naleszkiewicz has not always claimed to be involved in only "specific and routine administrative tasks." In an advertising brochure she was described as having a background in "marketing, management, communications and also liaison work with Federal and State agencies" that presumably would be available to Genesis' clients. When interrogatories were submitted to Ms. Naleszkiewicz, her spouse told her to tell the Commission that she knew nothing about various aspects of Genesis' business, which she did. As the hearing progressed Ms. Naleszkiewicz' memory faded and she became less and less cooperative and forthright. Her inability to answer numerous questions is inconsistent with her knowledge and demeanor and it reflects on her credibility. Ms. Naleszkiewicz has not demonstrated that she would make a reliable licensee. She has not told the truth in this proceeding. With her knowledge, Genesis defrauded Commission applicants and misrepresented material facts to the Commission. She does not possess the requisite character to become a Commission licensee.

ACCORDINGLY, IT IS ORDERED that the application of Nancy Naleszkiewicz (File No. 10494-CL-P-430-A-89) for a construction permit to establish a new cellular system IS DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington D.C. 20554

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

LETTER
November 13, 1992

Released: November 23, 1992

Allen Burton
Route 1
Hornbeak, TN 38232

Re: NAL/Acct. No. 215HF0017

Dear Mr. Burton,

This letter constitutes a Notice of Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended.

On October 1, 1992, we released a Notice of Apparent Liability against you in the amount of $2,000 for apparent violation of Section 97.113(d) of the Commission's rules, 47 C.F.R. Section 97.113(d). Section 97.113(d) prohibits the transmission of obscene and indecent words, language or meaning. On September 26, 1992, you responded to that Notice. For the reasons discussed below, we are reducing the forfeiture to $200, and this penalty is affirmed.

On June 29, 1992, you were monitored on frequency 14300 kHz. We found that the words and language transmitted were indecent within the meaning of Section 97.113(d) and prevailing Supreme Court and Commission precedent. In your response you apologize for the incident and state that you cannot afford to pay the $2,000 forfeiture and state why you cannot pay. The Communications Act of 1934 directs the FCC to consider ability to pay when imposing monetary forfeitures. 47 C.F.R. Section 503(b)(2).

Based on this consideration, the $2,000 for forfeiture is reduced to $200. If in the future, you repeat the same violations, however, the FCC may impose a substantially higher monetary forfeiture.

Please submit the $200 monetary forfeiture payment within 30 days of receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 215HF0017 should be placed on the check and it should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 C.F.R. Section 504(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTER-TEL NETSOLUTIONS, INC. File No. I-T-C-92-228

Application for authority to operate as an international resale carrier.

ADIR-ITS, LTD. File No. I-T-C-92-230

Application for authority to operate as an international resale carrier.

SONIC COMMUNICATIONS, INC. File No. I-T-C-92-231

Application for authority to operate as an international resale carrier.

OWN-A-PHONE, INC. File No. I-T-C-92-233

Application for authority to operate as an international resale carrier.

CONSOLIDATED NETWORK, INC. File No. I-T-C-92-235

Application for authority to operate as an international resale carrier.

THE CARDCALLER, INC. File No. I-T-C-92-237

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 4, 1992; Released: November 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by Inter-Tel NetSolutions, Inc. (Inter-Tel), Adir-ITS, Ltd. (Adir), Sonic Communications, Inc. (Sonic), Own-A-Phone, Inc. (Own-A-Phone), Consolidated Network, Inc. (CNI), and the CardCaller, Inc. (TCI).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-228, I-T-C-92-230, I-T-C-92-231, I-T-C-92-233, I-T-C-92-235 and I-T-C-92-237 ARE GRANTED; and

a. Inter-Tel is authorized to provide international switched voice service by the resale of the international switched voice service set forth in US Sprint's Tariff F.C.C. No. 2 between the U.S. and international points listed in that tariff;

b. Adir and CNI are authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs;

c. Sonic is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No.1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs;

d. Own-A-Phone is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs; and

e. TCI is authorized to provide international switched voice service by the resale of the international switched voice service set forth in US Sprint's Tariff F.C.C. No. 1 and Allnet's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-92-232

Application for authority to acquire and operate facilities for service between the U.S. and Bulgaria.

ORDER AND AUTHORIZATION

Adopted: November 4, 1992; Released: November 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Bulgaria by MCI Telecommunications Corporation (MCI).[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-232 IS GRANTED and MCI is authorized to:

a. lease from Comsat and operate 14 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Bulgaria furnished by MCI's correspondent in Bulgaria;

b. own and operate 14 voice-grade circuits in the Andover earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate 14 voice-grade connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and Bulgaria.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and Bulgaria -- that is, private lines which originate in the United States and terminate in Bulgaria or which originate in Bulgaria and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Bulgaria end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Bulgaria affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondent, and a copy of the agreements shall be filed with the Commission within 30 days of its execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

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[1] In its application MCI requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Bulgaria and points beyond. We note that should MCI obtain any interest in facilities beyond Bulgaria for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-92-236

Application for authority to acquire and operate facilities for service. between the U.S. and Albania.

ORDER AND AUTHORIZATION

Adopted: November 4, 1992; Released: November 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct private line service between the U.S. and Albania by MCI Telecommunications Corporation (MCI).[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-236 IS GRANTED and MCI is authorized to:

a. lease from Comsat and operate one 64-Kbps private line satellite circuit between the Andover, Maine earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Albania furnished by MCI's correspondent in Albania;

b. own and operate one 64-Kbps private line circuit in the Andover earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate one 64-Kbps private line connecting circuit between the Andover earth station and MCI's West Orange, New Jersey operating center; and

d. use said facilities to provide one 64-Kbps dedicated private line service between the U.S. and Albania.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and Albania -- that is, private lines which originate in the United States and terminate in Albania or which originate in Albania and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Albania end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Albania affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondent, and a copy of the agreements shall be filed with the Commission within 30 days of its execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

[1] In its application MCI requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Albania and points beyond. We note that should MCI obtain any interest in facilities beyond Albania for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CENTRAL MICHIGAN UNIVERSITY — File No. BPED-910227ME

For a Construction Permit for a
New FM Station on Channel 283A
in Traverse City, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1992; Released: November 23, 1992

By the Commission:

1. The Commission has before it for consideration an application for review filed on February 12, 1992 by Central Michigan University ("CMU"). CMU seeks review of a January 31, 1992 letter from the Chief, Audio Services Division, Mass Media Bureau ("Bureau"). The letter denied CMU's request for *nunc pro tunc* acceptance of the above-captioned application.

2. CMU submitted its application for the Traverse City, Michigan allotment on February 27, 1991. CMU was the only noncommercial educational applicant that applied for this allotment.[1] The allotment is in the non-reserved commercial band.[2] On November 1, 1991, CMU's application was dismissed as unacceptable for filing because CMU's application exceeded the 3.0 kilowatts effective radiated power and 100 meters height above average terrain limitation of the Canadian-U.S.A. FM Broadcasting Agreement. On December 12, 1991, CMU resubmitted its application with an amendment and requested reacceptance of its application *nunc pro tunc* pursuant to the Commission's August 2, 1984 *Public Notice* entitled "Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications", 56 RR 2d 776 (1984) ("*1984 Public Notice*"), *recon. denied*, 57 RR 2d 1603 (1985) ("*Public Notice Recon.*"). Pursuant to the *1984 Public Notice*, an applicant was given one opportunity to have its returned application reinstated *nunc pro tunc*.[3]

3. On January 31, 1992, the staff, treating CMU's request for reinstatement as a petition for reconsideration, denied the request, stating that since CMU's application was competing for a commercial FM allotment, its processing is governed by the FM "hard look" rules.[4] *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (1985) ("*Hard Look Order*").[5] The staff pointed out that an integral part of the "hard look" processing system is the explicit warning that if an application is found to be unacceptable for filing, it will not be reinstated *nunc pro tunc*.

4. CMU concedes in its application for review that the *Hard Look Order's* filing window procedures apply to its application, but contends that the Commission "twice articulated its policy that the *nunc pro tunc* reacceptance procedure should still apply for noncommercial educational FM applications." Application for review, at 4. First, CMU contends that in the *Public Notice Recon.*, adopted April 15, 1985, the Commission indicated that the *1984 Public Notice's* reinstatement *nunc pro tunc* policies apply to *all* AM and noncommercial educational FM applications. Second, CMU claims that in footnote 1 of Appendix D to the *Hard Look Order*, the Commission reiterated that the "hard look" policy does not apply to noncommercial FM applicants.

5. We believe that it is clear from a reading of the *Hard Look Order* in its entirety that the new procedures did not permit *nunc pro tunc* reinstatement of noncommercial educational applicants filing for allotments in the non-reserved band.[6] While the Commission noted that, generally, the "hard look" processing procedures would not apply to applications for an allotment in the reserved band, the

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[1] There were originally four mutually exclusive applicants for the Traverse City, Michigan facility. Two of the applicants, Running Rhodes, Inc. and Peninsula Radio Company, were dismissed for failure to pay the hearing fee, while CMU and Salija Bokram & Michael J. St. Cyr ("Bokram and St. Cyr") were dismissed for violations of the Working Arrangement for Allotment and Assignment of FM Broadcasting Channels 201-300 Under the Canadian-U.S.A. FM Broadcasting Agreement of 1947, as amended on September 7, 1984 ("Canadian-U.S.A. FM Broadcasting Agreement"). Bokram and St. Cyr filed an opposition to CMU's application for review. Additionally, Interlochen Center for the Arts ("Interlochen") filed an opposition to CMU's application for review. Bokram and St. Cyr as well as Interlochen state that they wish to apply for the Traverse City allotment in the event that a new filing window is opened.

[2] Frequencies 88.1 through 91.9 (channels 201-220) are reserved for noncommercial educational use. Frequencies 92.1 through 107.9 (channels 221-300) are considered the non-reserved band because the frequencies are not reserved for any specialized purpose. Noncommercial applicants may apply for a non-reserved frequency. *See* 47 C.F.R. § 73.513.

[3] To obtain this opportunity, the applicant was required, within 30 days of the date of return, to submit a petition for reconsideration together with an amendment to cure the defect in substantial completeness or in acceptability, provided that the amendment could not constitute a major change to the application.

[4] The Commission recently modified the "hard look" processing rules, and made these revised rules effective August 7, 1992. *Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074 (1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt.

[5] The *Hard Look Order* is reprinted at 58 RR 2d 776 (1985). Appendix D to the *Hard Look Order*, which was also issued separately as a Public Notice, is reprinted at 58 RR 2d 166 (1985).

[6] By way of background, prior to June 12, 1985, the Commission had been inundated with carelessly prepared commercial FM applications resulting in undue delay and waste of the staff's resources. At that time, all AM as well as both commercial and noncommercial educational FM applications were subject to the *1984 Public Notice* reinstatement *nunc pro tunc* policy. Effective that date, the Commission promulgated the "hard look" processing system in order to more efficiently process the expected thousands of applications for channels in the non-reserved commercial band allocated pursuant to BC Docket 80-90. Under the "hard look" processing system, applications which are not "substantially complete" are returned as not tenderable, while those

Commission specifically stated in footnote 35 to the *Hard Look Order* that "noncommercial, educational entities applying for a channel on the commercial band will be subject to the filing window and 'first come/first serve' processing system."[7] *Hard Look Order*, at 19,942 n.35. Our purpose behind footnote 35 was to ensure comparable treatment of similarly situated applicants as required by *Melody Music*, which broadly sets out the Commission's obligation in this regard.[8] *Melody Music, Inc. v FCC*, 345 F.2d 730 (1965). *See also Ramon Rodriguez & Associates*, 3 FCC Rcd 407 (1988).

6. The defect in the instant case is one of technical acceptability. *See Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) (treaty power/height limitations are technical acceptability criteria). The *PublicNotice Recon.* does not support CMU's contentions that noncommercial applicants applying for a non-reserved commercial channel are not subject to the "hard look" processing rules and that the Commission intended to distinguish between the filing window procedures and the *nunc pro tunc* reacceptance of noncommercial applications applying on the commercial band. The *Public Notice Recon.* acknowledged the impending new filing window procedures to be established in the *Hard Look Order*, which became effective two months later. CMU, by its own admission and pursuant to footnote 35 of the *Hard Look Order*, was subject to these filing window procedures. These procedures, *inter alia*, prohibit the *nunc pro tunc* reinstatement of an application dismissed as unacceptable for filing since the applicant had the amendment as of right period to perfect its application with respect to technical acceptance criteria. We affirm the Bureau's action.

7. Accordingly, for the foregoing reasons, IT IS ORDERED, That the application for review filed on February 12, 1992 by Central Michigan University IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

found to be tenderable are placed on a publicly released "Notice of Tenderability". For 30 days following the release of the "Notice of Tenderability", applicants may submit minor curative amendments as a matter of right. Following the amendment as of right period, an application is studied by the staff to determine if it meets the Commission's technical acceptability requirements. Applications not meeting these requirements are returned as not acceptable for filing.

[7] The Commission recently reaffirmed that the "hard look" processing procedures applied to noncommercial educational applications filed in the non-reserved commercial band. *Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074, 5074 n.1 (1992).

[8] We note that in the present case the Bureau dismissed a commercial application for the *same* violation of the Canadian-U.S.A. FM Broadcasting Agreement that resulted in the dismissal of CMU's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Applications of

SHAWN PHALEN File No. BPH-851231MO

JAMES EVANS File No. BPH-851231MR

For Construction Permit
for New FM Broadcast
Station at Montecito,
California

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1992; Released: November 23, 1992

By the Commission:

1. In this memorandum opinion and order, we will approve a settlement agreement between Shawn Phalen and James Evans terminating this comparative proceeding.[1] We will also grant the parties' request to vacate the decisions of the ALJ and the Review Board in this proceeding.

I. BACKGROUND

2. Shawn Phalen and James Evans are the two remaining applicants in this comparative proceeding for a new FM radio station in Montecito, California. The Review Board found that Phalen lacked the basic qualifications to be a Commission licensee, while Evans was basically qualified.[2] *Shawn Phalen*, 7 FCC Rcd 623, 627 ¶ 32 (Rev. Bd. 1992). *See also Shawn Phalen*, 4 FCC Rcd 5714 (I.D. 1989); 6 FCC Rcd 2789 (S.I.D. 1991). Specifically, the Board found that Shawn Phalen was disqualified because her father, Richard Phalen was an undisclosed real-party-in-interest in her application. 7 FCC Rcd at 625-26 ¶ ¶ 16-19.

II. SETTLEMENT AGREEMENT

3. Phalen and Evans now seek to settle this proceeding. Under the terms of the settlement, Evans' application would be granted and Evans would pay Phalen $130,000 for the dismissal of her application. Phalen states under penalty of perjury that she did not file her application for the purpose of entering into a settlement agreement. She submits documentation that her legitimate and prudent expenses exceed $130,000. The parties contend that the settlement would serve the public interest by avoiding unnecessary litigation and by expediting new service to the public.

4. The parties also request that the Commission vacate the ALJ's initial and supplemental initial decisions and the Review Board's memorandum opinion and order concerning Phalen, cited above. They contend that this is the customary practice of the Commission in approving settlements. *See Susan S. Mulkey*, 6 FCC Rcd 1814, 1815 n.3 (1991).

5. The Mass Media Bureau opposes approval of the settlement agreement. Although the Bureau agrees that the settlement conforms in most respects with 47 U.S.C. § 311 and 47 C.F.R. § 73.3525, including Phalen's documentation of expenses, it contends that one aspect of the agreement would disserve the public interest. According to the Bureau, the Commission should not, as the parties request, vacate the findings and conclusions made by the ALJ and the Board regarding Richard Phalen's allegedly improper participation in his daughter's application here.

6. The Bureau notes that Richard Phalen is the principal stockholder of Western Cities Broadcasting, Inc., which seeks renewal of its license for station KQKS(FM), Longmont, Colorado, in MM Docket No. 90-424. The Bureau asserts that the findings and conclusions made in this proceeding concerning Richard Phalen are relevant to Western's basic qualifications in the Longmont comparative renewal proceeding.[3] In particular, the following issue was designated in the Longmont proceeding:

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[1] Now pending before the Commission are: (1) a Joint Request for Approval of Settlement filed June 17, 1992 by Shawn Phalen and James Evans; (2) a Partial Opposition to Joint Request for Approval of Settlement and a Motion for Leave to File Partial Opposition both filed June 24, 1992 by Longmont Broadcasting Corporation (LBC); (3) Amador S. Bustos['] Concurrence in Motion for Leave to File Partial Opposition and Partial Opposition to Joint Request for Approval of Settlement filed by Longmont Broadcasting Corporation, filed June 26, 1992; (4) the Mass Media Bureau's Opposition to Joint Request for Approval of Settlement filed July 1, 1992; (5) Consolidated Relies to Oppositions to Joint Request for Approval of Settlement filed July 6, 1992 by Phalen; (6) Comments of Western Cities Broadcasting, Inc. filed July 7, 1992; (7) a Motion for Leave to Respond filed July 20, 1992 by LBC; and (8) a Motion to Strike [LBC's motion] filed July 24, 1992 by Phalen and an opposition filed July 28, 1992 by LBC.

[2] The Board did not initially grant Evan's application because of the need to resolve questions concerning the qualifications of two applicants that have since dropped out of this proceeding. *See* 7 FCC Rcd at 627-28 ¶ ¶ 32-35; *Shawn Phalen*, FCC 92M-460 (Apr. 15, 1992) at ¶ 15. The Board thereafter granted Evan's application. *Shawn Phalen*, 7 FCC Rcd 3122 (1992). The time for filing applications for review of the Board's action was extended until after disposition of the pending settlement agreement by *Shawn Phalen*, FCC 92I-053 (Jun.22, 1992).

[3] Two applicants for construction permits in the Longmont proceeding, Longmont Broadcasting Corporation (LBC) and Amador S. Bustos, also oppose approval of the settlement for the same reason as the Bureau. Because they are not parties to this proceeding, they do not have the right to file oppositions. *See* 47 C.F.R. § 1.294(a) (parties to hearings may file oppositions). However, because the resolution of the issue before us would affect the rights of LBC and Bustos and because LBC's discussion of collateral estoppel, noted below, would assist the Commission, we will entertain their pleadings. *See Sumiton Broadcasting Co., Inc.*, 14 FCC 2d 256, 256-57 ¶ 3 (Rev. Bd. 1968).

If a final decision is rendered in the Montecito, California, proceeding (MM Docket No. 87-426), in which it is determined that Richard C. (Rick) Phalen was an undisclosed real party-in-interest in the application of his daughter, Shawn Phalen, to determine the effect(s) thereof on Western's qualifications to be a Commission licensee.

Western Cities Broadcasting, Inc., 5 FCC Rcd 6177, 6180 ¶ 22 (Mass Med. Bur. 1990).

7. Noting that the ALJ and the Board found in this case that Richard Phalen was indeed an undisclosed real-party-in-interest in his daughter's application, the Bureau maintains that it would disserve the public interest to vacate these findings, since the issue would then have to be relitigated in the Longmont proceeding. The Bureau argues that the relevance of these findings to the Longmont proceeding means that they have not been mooted by settlement of the Montecito proceeding. The Bureau urges that the settlement should not be approved unless the parties delete their request to vacate the findings and conclusions relative to Richard Phalen.

III. DISCUSSION

8. The case before us presents a difficult procedural situation. Although, as the parties point out, the findings and conclusions in this proceeding regarding Richard Phalen are relevant to the Longmont proceeding, the application of collateral estoppel is problematic because Richard Phalen is not a party in this case. This case thus differs from the situation involved in *RKO General, Inc. (WAXY-FM)*, 5 FCC Rcd 642, 646 n.11 (1990), relied on by the Bureau and LBC. In *RKO*, although there was a settlement, relevant findings and conclusions were carried over into related litigation. This was possible because issues concerning a party to several related proceedings were litigated in one proceeding, in which all of those affected were made parties, and the findings and conclusions reached were made controlling in all of the other proceedings involving the same parties. Thus, a settlement in the proceeding in which the issue was being heard did not affect the rights of the same parties to press their contentions with regard to the relevant issues in any of the remaining proceedings. *See RKO General, Inc. (WAXY-FM)*, 4 FCC Rcd 4679, 4680 ¶ 6 (Rev. Bd. 1989), *rev. denied in pertinent part*, 5 FCC Rcd 3222 (1990).

9. Here, by contrast, Richard Phalen was not formally made a party to the Montecito proceeding. Thus, no provision was made for the findings and conclusions in Montecito to carry over automatically to the Longmont proceeding where they would remain viable and have full effect in further litigation. Rather, as set forth above, the Longmont designation order merely appears to contemplate that a final decision reached in the Montecito proceeding could be binding on Richard Phalen in Longmont under the doctrine of collateral estoppel. Vacating the findings and conclusions in Montecito would prevent them from being treated as final and binding in Longmont and, thus, prevent the application of collateral estoppel. It is this result that the Bureau and LBC seek to avoid.

10. The objections of the Bureau and LBC to vacating the findings and conclusions regarding Richard Phalen, however, run counter to the standard practice of the Commission and the courts. Approval of the settlement agreement would moot any further appeal of the Board's findings and conclusions in this proceeding. Failure to vacate the Board's findings and conclusions would allow them to become final for purposes of subsequent litigation despite the fact that they had not been fully appealed. The Supreme Court held that, where a case was pending before a court under these circumstances, it was the duty of the court, if the parties so requested, to vacate. In that way, the parties would not be prejudiced by future application of a decision that had not been subject to the statutory scheme of appeals because further review was prevented by "happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 38-40 (1950). Subsequently, the United States Court of Appeals for the District of Columbia Circuit confirmed that this was also the "correct course" for the Commission. *Boston Community Media Committee Minority Caucus v. FCC*, 509 F.2d 516, 517 (D.C. Cir. 1975). We see no reason to disregard this well-established and judicially approved practice here.

11. Additionally, we do not discern an appropriate basis for giving effect to the designation order's suggestion that the findings and conclusions in the Montecito proceeding could be subject to the doctrine of collateral estoppel and therefore binding on Western in the Longmont proceeding, even if they did become final. Neither Western nor Richard Phalen was a party in Montecito and the doctrine of collateral estoppel applies only where there is an identity of parties or their privies between the two proceedings. *See Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1245 (11th Cir. 1985).

12. With respect to the question of privity, the information presented in the responses to the proposed settlement of the Montecito proceeding does not provide an adequate basis to find either that: (1) Richard Phalen participated in control of the Montecito litigation despite his lack of party status; or (2) Shawn Phalen adequately represented Richard Phalen's interests in the Montecito litigation. *See Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir. 1990); *Gill & Duffus Services, Inc. v. A. M. Nural Islam*, 675 F.2d 404, 405-06 nn.3-4 (D.C. Cir. 1982). Although the Review Board in this case concluded that Richard Phalen was the real-party-in-interest behind his daughter's application, the correctness of that underlying conclusion is not now before us for review. We therefore do not rely, as LBC suggests, on *Ocean Pines LPB Broadcast Corp.*, 5 FCC Rcd 5821, 5825 ¶ ¶ 34-35 (Rev. Bd. 1990), in which the Board found that an individual, Berger, was in privity with a party to an earlier proceeding for purposes of collateral estoppel after the Board affirmed that he was a real-party-in-interest in the earlier proceeding.

13. For the reasons above, we will vacate the findings and conclusions in this case. Nonetheless, we are sympathetic to the Bureau's desire to avoid unnecessary litigation. Therefore, we direct the ALJ in the Longmont proceeding -- after appropriately modifying the wording of the designated issue -- to use his discretion to avoid unnecessary duplication of the proceedings already conducted in Montecito. For example, the ALJ should consider to the extent possible the record already compiled in Montecito consistent with Western's hearing rights and should consider to what extent the record must be supplemented with new evidence to assure that Western has been afforded all of its hearing rights. *See Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 162 ¶ 36 (1990); 47 C.F.R. § 1.248(d). Additionally, the parties in Longmont may wish to argue that the ALJ should adopt and incorporate by reference various of the Montecito

findings and conclusions as his own. Procedures, such as those described above, would not abridge the rights of the parties in the Longmont proceeding as long as the parties have the opportunity to develop a full evidentiary record and a full opportunity to make their arguments in proposed findings and conclusions. *See, e.g., Boston and Maine Railroad v. United States*, 208 F. Supp. 661, 669 (D. Mass. 1962).

14. In view of the foregoing, we find that the settlement agreement is in conformance with 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525 and that its approval would serve the public interest.

IV. ORDERS

15. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Partial Opposition filed June 24, 1992 by Longmont Broadcasting Corporation IS GRANTED; and that the Motion to Strike filed July 24, 1992 by Shawn Phalen IS DENIED and the Motion for Leave to Respond filed July 20, 1992 by Longmont Broadcasting Corporation IS GRANTED.

16. IT IS FURTHER ORDERED, That Joint Request for Approval of Settlement filed June 17, 1992 by Shawn Phalen and James Evans IS GRANTED and the attached settlement agreement IS APPROVED.

17. IT IS FURTHER ORDERED, That *Shawn Phalen*, 7 FCC Rcd 623 (Rev. Bd. 1992); 6 FCC Rcd 2789 (S.I.D. 1991); 4 FCC Rcd 5714 (I.D. 1989) ARE VACATED.

18. IT IS FURTHER ORDERED, That the application of Shawn Phalen (File No. BPH-851231MO) IS DISMISSED and the application of James Evans (File No. 851231MR) IS GRANTED.

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GCI Liquidating Trust File No. 13228-CF-TC-(4)-92
Request for Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1992; Released: November 23, 1992

By the Chief, Domestic Facilities Division:

1. GCI Liquidating Trust (GCI) has requested a declaratory ruling that its proposed transfer of control of Business Telecommunications Corporation (BTC) to Cam-Net Holdings, Inc. (Cam-Net Holdings)[1] does not violate the alien ownership restrictions of the Communications Act.[2] For the reasons discussed below, this request is granted.

2. In support of its request, GCI states that it is the successor in interest to Goeken Communications Inc., a Delaware corporation in dissolution, and that it holds all the capital stock of BTC, the licensee of four common carrier microwave stations. GCI has agreed, subject to Commission approval, to transfer 60% of BTC's stock to Cam-Net Holdings.[3] BTC will remain the licensee and will continue to operate as a U.S. corporation whose officers and directors are all U.S. citizens. Cam-Net Holdings is also a U.S. corporation with U.S. citizens as officers and directors but its sole shareholder is Cam-Net Communications Network, Inc. (Cam-Net), a corporation organized under Canadian law. In addition, 75% of Cam-Net's officers are Canadian citizens. GCI states that Cam-Net's stock is publically traded and that over 90% of its stock is owned by U.S. citizens.

3. Based on these facts, the provisions of Section 310 (b)(4) of the Communications Act, 47 U.S.C. Section 310 (b)(4), give the Commission discretion to determine whether it is in the public interest to allow the transfer of BTC to Cam-Net Holdings.[4] Section 310 (b)(4) reads as follows:

> No broadcast or common carrier ... radio station license shall be granted to or held by- ... (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

In this case, BTC will be 60% controlled by Cam-Net Holdings, 100% of whose stock is owned by Cam-Net, a corporation organized under the laws of a foreign country. In addition, three out of four of Cam-Net's officers are not U.S. citizens. Although the statutory benchmarks are exceeded in this case, Commission precedent supports a finding that it is in the public interest to approve this transfer of control.

4. Determinations of whether the public interest would be served by allowing indirect alien ownership of licensees are made on a case-by-case basis.[5] In *GRC Cablevision, Inc.*, 47 F.C.C. 2d 467 (1974), the Commission granted a construction permit for a station in the Cable Television Relay Service(CARS)[6] to a company whose corporate parent was approximately 60% controlled by Canadian citizens. The Commission noted that the parent corporation had significant U.S. involvement, that the foreign country involved has had a traditionally close and friendly relationship with the United States and no adverse information had been submitted regarding the controlling individuals. In addition, the facility in question was to be used for the relay of broadcast signals and was essentially passive in nature.[7]

5. In the instant case, many of the same considerations apply. Cam-Net Holdings is controlled by a Canadian corporation with significant U.S. involvement. Its control of the licensee is limited to 60%, the remaining 40% to be controlled by a U.S. citizen who holds other FCC licenses.[8] The transfer application is unopposed. Canada continues to have close ties to the United States. Finally, the licenses involved are in the point-to-point microwave service where the licensee will exercise no control over the content of transmissions.[9] Based on existing precedent and the facts presented, it would not be in the public interest to deny the applicant's request.

6. Accordingly, IT IS ORDERED that the Request for Declaratory Ruling filed by GCI Liquidating Trust IS GRANTED and the application to transfer stock of Business Telecommunications Corporation as described in the application, amendment, and clarifications IS HEREBY GRANTED.

7. IT IS FURTHER ORDERED that this order is effective upon adoption.

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[1] File No. 13228-CF-TC-(4)-92.

[2] 47 U.S.C. Section 310 (b).

[3] GCI has filed an amendment with clarifications to its application which state that the remaining 40% of BTC's stock will be owned by GCI Liquidating Trust which is controlled by John D. Goeken, Trustee. *See* Letters from Counsel, GCI to Chief, Common Carrier Bureau, October 27, 1992, November 3, 1992 and November 6, 1992.

[4] *See* Primemedia Broadcasting, Inc., 3 FCC Rcd 4293 (1988).

[5] *Id.* at 4295.

[6] CARS stations were subject to the alien ownership restrictions of Section 310 at the time this decision was made. In addition, the applicable section of the Communications Act in 1974 was 47 USC Section 310 (a)(5).

[7] *Id.*

[8] *See* November 3, 1992 clarification letter.

[9] Request for Declaratory Ruling at p. 3.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Champion Industries, Inc. File No. 2672-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the F-group channels at Alexandria, Louisiana

ORDER ON RECONSIDERATION

Adopted: November 6, 1992; Released: November 24, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Champion Industries, Inc. (Champion) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Alexandria, Louisiana, and requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of the application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Champion was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Champion was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Champion was also advised in the deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Champion provided some, but not all, of the requested information. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), the Division dismissed Champion's application for its failure to comply completely in a timely manner with the Division's request for information. While admitting that all of the requested information had not been submitted, the president of Champion stated:

> I fully understand that Champion has no practical or legal means to challenge the Commission's decision to dismiss this application for the reasons cited in your ... letter. I simply request that the Commission reconsider this dismissal decision in light of this letter and the recent record of Champion's performance. I cannot guarantee that this deficiency can be cured even if a reinstatement is granted, but, if not, it won't be for a lack of effort.

Petition at 2.

4. *Discussion.* As of the date of the Division's dismissal action, Champion still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Champion had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a) of the rules.[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5215, 5216 (Comm. Car. Bur. 1991).

5. Also, Champion failed to submit the information necessary for compliance with FCC and Federal Aviation Administration (FAA) regulations concerning avoidance of aeronautical hazards pursuant to 47 C.F.R. Secs. 17.4(f) and 21.15(d). *See also* 47 C.F.R. Sec. 21.15(c). In addition, Champion failed to comply with the request to submit the Section 21.902(i) ITFS interference analysis for its application. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Champion failed to submit the required analysis

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[1] The deficiencies cited in the letter were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (3) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees pursuant to 47 C.F.R. Sec. 21.902(i); and (4) correct antenna structure height information for Federal Aviation Administration (FAA) air navigation hazard program compliance as required by 47 C.F.R. Secs. 17.4(f) and 21.15(d).

[2] Even if Champion was not required to comply with the requirements of Section 21.15(a), it was required, under Section 21.13(c) of the rules, to submit a lease or option agreement upon Division request. Section 21.13(a) provides, *inter alia*,: "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

for more than two years after the analysis was requested. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

6. Champion had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than two years substantially impeded the expeditious offering of MMDS at Alexandria. Also, Champion's failure to respond in a timely manner to the Division's requests for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Champion had not provided the required ITFS interference analysis and the required lease or option agreement. The Division was not in a position, therefore, to complete evaluation of Champion's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion and Ordering Clause.* Having carefully considered the arguments and evidence presented, we find that dismissal of Champion's application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Champion Industries, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Presco Corporation File No. 11917-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution
Service station on the F-group
channels at Beaumont, Texas

ORDER ON RECONSIDERATION

Adopted: November 13, 1992; Released: November 24, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Presco Corporation requested reinstatement of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Beaumont, Texas, after its dismissal by the Domestic Facilities Division (Division) on delegated authority.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of the application pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Presco was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Presco was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Presco was also advised in the deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Presco provided some, but not all, of the requested information. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the rules, the Division dismissed by letter Presco's application for its failure to comply completely in a timely manner with the Division's request for information. While admitting that it had "been delinquent in filing responses to the FCC's deficiency letter," Presco argues, on reconsideration, that its application should be reinstated because: (1) it had expended resources on petitions to deny filed against its applications in other markets; (2) it has been "active in the Wireless Cable Television Association;" (3) it has added staff and adopted procedures to perfect its applications which have not yet been dismissed.

4. *Discussion.* As of the date of the Division's dismissal action, Presco still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Presco had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Section 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. Also, Presco failed to submit current financial qualification data, pursuant to Section 21.17. Instead, Presco declared that it had decided to rely on a 1983 bank letter, which, according to FCC records, was never submitted. Nor, did Presco provide a copy of the 1983 letter on reconsideration. In addition, Presco failed to comply with the request to submit the Section 21.902(i) ITFS interference analysis for its application. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Presco failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

6. Presco had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit the curative amendments for more than 31 months substantially impeded the expeditious offering of MMDS at Beaumont. Also, Presco's failure to respond in a timely

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[1] The deficiencies cited were the absence of: (1) a public interest statement, pursuant to 21.13(a)(4); (2) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (3) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (4) answers to each of the questions on pages 5, 6 and 7 of the application, FCC Form 435; (5) a programmer non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (6) the required tariff exhibit, pursuant to Item 29 of FCC Form 435 and 47 C.F.R. Sec. 21.13(a); (7) required information on station maintenance and emergency repairs, pursuant to 47 C.F.R. Sec. 21.15(e) and FCC Form 435 item 18; (8) the interference analysis required by 47 C.F.R. Sec. 21.901(d)(7); and (9) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Presco was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or option agreement after the Division directed it to do so. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Presco had not provided the required ITFS interference analysis, the required current financial qualification data, and the required lease or option agreement. The Division was not in a position, therefore, to complete evaluation of Presco's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion and Ordering Clause.* Having carefully considered the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Presco Corporation regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

T/V Communications Associates — File No. 14113-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the F-group channels at Bellingham, Washington

ORDER ON RECONSIDERATION

Adopted: November 13, 1992; Released: November 24, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* T/V Communications Associates (Associates) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Bellingham, Washington, and requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of the application pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Associates was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Associates was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Associates was also advised in the deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Associates provided some, but not all, of the requested information. Pursuant to Secs. 21.13(c), 21.20(d) and 21.28(d) of the rules, the Division dismissed by letter Associates' application for its failure to comply completely in a timely manner with the Division's request for information. While admitting that it had failed to submit the requested information, Associates argues its application should be reinstated because: (1) its failure to file a lease or option agreement was an accident; (2) it never should have been asked to submit an ITFS interference analysis; and (3) it has "expended considerable resources perfecting its application and negotiating with a prospective programmer." Petition at 4.

4. *Discussion.* After two extensions were granted and as of the date of the Division's dismissal action, Associates still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Associates had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Sec. 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. Also, Associates failed to submit the requested current financial qualification data, pursuant to Section 21.17.[4] Instead, Associates submitted a bank letter, but at the time of submission, Section 21.17(e) required that a bank financing letter must provide loan details including a bank loan commitment letter. Associates' letter lacked a commitment because it was contingent upon Associates meeting credit qualification criteria at some future point in time, with the qualification criteria to be determined at that future time, and contingent upon Associates submitting satisfactory documentation.

6. In addition, Associates failed to comply with the request to submit the Section 21.902(i) ITFS interference analysis for its application. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS

[1] The deficiencies cited in the letter were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) correct data for Federal Aviation Administration (FAA) air navigation hazard program compliance, pursuant to 47 C.F.R. Secs. 17.4(f) and 21.15(d); (3) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (4) an interference analysis of the possible adverse impact upon Canadian communications, as required by 47 C.F.R. Sec. 21.902(c)(5); (5) a programmer non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (6) an updated licensee qualification report, FCC Form 430; and (7) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Associates was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to Sec. 21.13(c), to submit a lease or option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia*,: "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

[4] Even if Associates was not required to comply with the requirements of Section 21.17, it was required pursuant to Section 21.13(c) to submit it after the Division directed it to do so.

station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Associates failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 Comm. Car. Bur. 1988). Associates failed to respond to this deficiency, but states, on reconsideration, for the first time, that the Division should never have requested an ITFS analysis in its deficiency letter.

7. Associates had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time.[5] *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than 32 months substantially impeded the expeditious offering of MMDS at Bellingham. Also, Associates' failure to respond in a timely manner to the Division's requests for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Associates had not provided the required ITFS interference analysis, the required current financial qualification data, the required FAA information, the required Canadian interference analysis, and the required lease or option agreement. The Division was not in a position, therefore, to complete evaluation of Associates' MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

8. *Conclusion and Ordering Clause.* Having carefully considered the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration filed by T/V Communications Associates regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[5] Associates' second extension expired more than 30 months prior to dismissal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-272

In the Matter of

Amendment of Section 73.202(b), RM-8107
Table of Allotments,
FM Broadcast Stations.
(Alturas, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 28, 1992; Released: November 24, 1992

Comment Date: January 15, 1993
Reply Comment Date: February 1, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KCNO, Inc. ("petitioner"), licensee of Station KYAX(FM), Channel 233C1, Alturas, California, seeking the substitution of Channel 267C for Channel 233C1 and modification of its license accordingly. Petitioner stated its intention to apply for Channel 267C if allotted to Alturas, as requested.

2. A staff analysis has determined that Channel 267C can be allotted to Alturas in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site, located 31.7 kilometers (19.7 miles) southwest of the community.[1]

3. We believe the public interest would be served by consideration of petitioner's proposal since it could provide Alturas with an expanded coverage area FM service. Therefore, we shall propose to modify the license for Station KYAX(FM), as requested. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, should another party indicate an interest in the Class C allotment, the modification could not be implemented unless an additional equivalent class channel is also allotted.[2]

4. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Alturas, California	233C1	267C

5. IT IS ORDERED, That the Secretary shall send a copy of this *Notice* to the permittee of Station KCHQ(FM), as follows: Western States Broadcasting, 12550 Brookhurst St., #A, Garden Grove, CA 92640.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 15, 1993,** and reply comments on or before **February 1, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

R. L. Hansen
President, KCNO, Inc.
P.O. Box 570
Alturas, CA 96101

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been

[1] Coordinates for Channel 267C at Alturus are 41-16-54 and 120-48-02. Although the Alturas proposal is short spaced to the construction permit issued for Station KCHQ(FM), Channel 267C1, Altamont, Oregon, Station KCHQ(FM) was modified effective September 8, 1992, to specify operation on Channel 249C1, in MM Docket No. 91-341. *See* 7 FCC Rcd 4599 (1992). We will serve a copy of this *Notice* on Station KCHQ(FM).

[2] In this regard petitioner advises that either Channel 232 or Channel 293 can also be allotted to Alturas should other parties indicate an interest in applying for a Class C channel at that community. We have selected Channel 293C since Channel 232C is 7.3 kilometers short-spaced to a proposal to allot Channel 232B1 to Grass Valley at coordinates 39-14-44 and 120-57-52 in MM Docket No. 90-189. *See* 5 FCC Rcd 2137 (1990). We have determined that Channel 293C can be allotted to Alturas without the imposition of a site restriction at coordinates 41-29-18 and 120-32-18.

served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-161

In the Matter of

Amendment of Section 73.202(b), RM-8011
Table of Allotments,
FM Broadcast Stations.
(Glencoe and Le Sueur,
Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 28, 1992; Released: November 24, 1992

By the Chief, Allocations Branch:

1. At the request of Waite Park Broadcasting Company ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 5004 (1992), proposing the substitution of Channel 241C3 for Channel 241A at Le Sueur, Minnesota, the change of the community of license for the channel from Le Sueur to Glencoe, Minnesota, and modification of the construction permit for Station KQXA to specify operation on Channel 241C3 at Glencoe. Petitioner filed comments stating its intention to apply for Channel 241C3 at Glencoe.[1]

2. The *Notice* stated that the reallotment and upgrading of Channel 241A would provide Glencoe with its first local transmission service, whereas petitioner has been unable to provide any service to Le Sueur. Petitioner noted that it has been attempting to construct and operate Station KQXA at Le Sueur since April 14, 1991. However, petitioner states that the site meeting the Commission's spacing requirements is located in a small portion of eastern Sibley County Minnesota. According to petitioner, its request for a conditional use permit has been continualy denied by the County Planning Commission. Therefore, petitioner has never operated Station KQXA at Le Sueur. Petitioner indicates that a site is available at Glencoe that fully meets the Commission's channel spacing requirements. Further, deleting the allotment at Le Sueur will not deprive the community of broadcast service as four FM stations serve Le Sueur with a 60 dBu coverage contour. Petitioner notes that Station KRBI(AM), St. Peter, Minnesota, encompasses Le Sueur with its 2 mV/m signal contour and has provided significant programming directed towards the needs of the residents of Le Sueur since 1957. Since 1959, the station has maintained a full time studio and office in Le Sueur. Petitioner believes that reallotment of the channel from Le Sueur to Glencoe will create a more equitable distribution of broadcast service and a more efficient use of the broadcast spectrum.

3. We believe the public interest would be served by substituting Channel 241C3 for Channel 241A and reallotting the channel from Le Sueur to Glencoe, Minnesota, and modifying Station KQXA's construction permit to specify operation on Channel 241C3 at Glencoe. We conclude that petitioner has shown that it has been unable to initiate operation at Le Sueur despite diligent efforts. While the removal of Channel 241A at Le Sueur will remove Le Sueur's sole potential local service, we find that the change in community will not cause any disruption to existing service since Station KQXA has never been on the air.

4. Channel 241C3 can be allotted to Glencoe in compliance with the Commission's minimum distance separation requirements at petitioner's specified site.[2] In accordance with the provisions of Section 1.420(g) and (i) of the Commission's Rules, we will modify the construction permit for Station KQXA to specify Glencoe, Minnesota, as its community of license on Channel 241C3 in lieu of Channel 241A at Le Sueur, Minnesota.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 8, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Glencoe, Minnesota	241C3
Le Sueur, Minnesota	---

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KQXA, Channel 241A, Le Sueur, Minnesota, IS MODIFIED to specify operation on Channel 241C3, Glencoe, Minnesota, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of

[1] Don W. Jasperson, Executive Vice President of the Glencoe Area Chamber of Commerce, filed informal comments in support of the reallotment of Station KQXA from Le Sueur to Glencoe.

[2] The coordinates for Channel 241C3 at Glencoe are 44-46-09 and 94-09-05.

an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Waite Park Broadcasting Company, permittee of Station KQXA, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-496

In the Matter of

Amendment of Section 73.202(b),	RM-6346
Table of Allotments,	RM-6469
FM Broadcast Stations.	RM-6625
(Boalsburg, Clearfield,	RM-6626
Duncansville, Jersey Shore,	RM-6627
Laporte, Lewisburg,	
Lock Haven, Mill Hall,	
Muncy, Renovo, Riverside,	
St. Marys, and Tioga,	
Pennsylvania)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 30, 1992; Released: November 24, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration of its *Report and Order*, 6 FCC Rcd 4296 (1991)("*R&O*"), filed by Louis J. Maierhofer, d/b/a Town, Gown and Country Radio ("Town"), permittee of Station WUNS(FM), Channel 242A, Lewisburg, Pennsylvania. The *R&O* allotted, *inter alia*, Channel 279A in lieu of Channel 242A at Lewisburg, with a site restriction of 10.8 kilometers (6.7 miles) west of the community, and modified Town's construction permit for Station WUNS(FM) accordingly.[1] Covenant Broadcasting Company ("Covenant"), licensee of WJSA-FM, Channel 228A, Jersey Shore, Pennsylvania, Pro Marketing, Inc. ("Pro Marketing"), licensee of Station WHTO(FM), Muncy, Pennsylvania, and Boalsburg Broadcasting Company ("Boalsburg"), permittee of Station WVCV, Channel 225A, Boalsburg, Pennsylvania, filed oppositions. Cary H. Simpson tr/as The Elk-Cameron Broadcasting Company ("Elk-Cameron"), licensee of Station WKBI-FM, Channel 232A, St. Marys, Pennsylvania, filed a partial opposition and motion for severance.[2] Town filed consolidated reply comments.

2. *Background.* The *Notice of Proposed Rule Making and Order to Show Cause (Boalsburg, et al., Pennsylvania)*, 3 FCC Rcd 6116 (1988), sought comment on two mutually exclusive petitions for rule making filed by Covenant and Elk-Cameron. In response to the *Notice*, several parties, including Pro Marketing, filed counterproposals. The processing of Town's application (File No. BPH-880721MI) for Channel 242A at Lewisburg was blocked by the Pro Marketing counterproposal due to a short-spacing conflict between the site specified in Town's application and the counterproposal. In a letter dated June 6, 1989, Town requested that its application be granted conditioned on the outcome of this docket.[3] On January 30, 1990, the FM Branch granted Town's application for construction permit. That permit contained the following language:

> The issuance of this permit is conditioned on the final outcome of MM Docket No. 88-496. Accordingly, any construction undertaken pursuant to this permit is at the permittee's sole risk. *See Meridian Communications*, 2 FCC Rcd 5904 (Rev. Bd. 1987)

3. The *R&O* resolved a number of conflicting petitions for rule making. Covenant requested the substitution of Channel 227B1 for Channel 228A at Jersey Shore, Pennsylvania, and modification of its license for Station WJSA-FM to specify operation on the higher class channel, with channel substitutions at Renovo and Tioga, Pennsylvania to accommodate its upgrade. Elk-Cameron requested the substitution of Channel 230B1 for Channel 232A at St. Marys, Pennsylvania, and the modification of its license for Station WKBI-FM to specify operation on the higher class channel, with channel substitutions at Clearfield, Boalsburg, and Renovo, Pennsylvania. Pro Marketing's counterproposal, requesting the substitution of Channel 227B1 for Channel 280A at Muncy, Pennsylvania, the modification of its license for Station WHTO-FM, and the allotment of an additional channel at Laporte, Pennsylvania, conflicted with Covenant's proposal to substitute Channel 227B1 for Channel 228A at Jersey Shore. To resolve this conflict, Pro

[1] The *R&O* also granted allotments at the following communities:

Boalsburg, Pennsylvania	Channel 229A
Clearfield, Pennsylvania	Channel 226B1
Jersey Shore, Pennsylvania	Channel 242B1
Laporte, Pennsylvania	Channel 280A
Mill Hall, Pennsylvania	Channel 254A
Muncy, Pennsylvania	Channel 227B1
Renovo, Pennsylvania	Channel 254A
St. Marys, Pennsylvania	Channel 230B1
Tioga, Pennsylvania	Channel 234A

In addition, the *R&O* modified the licenses of Covenant Broadcasting Company for Station WJSA-FM, Channel 228A, Jersey Shore, Pennsylvania, Elk-Cameron Broadcasting Company for Station WKBI-FM, Channel 232A St. Marys, Pennsylvania, Clearfield Broadcasters, Inc. for Station WQYX(FM), Channel 230B1, Clearfield, Pennsylvania, and Pro-Marketing, Inc. for Station WHTO-FM, Channel 280A, Muncy, Pennsylvania to specify the operation on Channels 242B1, 230B1, 226B1, and 227B1, respectively. The *R&O* also modified the construction permits of Kennedy Broadcasting, Inc., Station WHMU, Channel 226A, Renovo, Pennsylvania, Anita L. Clark, Station WHPD, Channel 227A, Tioga, Pennsylvania, and Boalsburg Broadcasting Company, Station WVCV, Channel 225A, Boalsburg, Pennsylvania, to specify operation on Channels 295A, 234A, and 229A, respectively.

[2] Elk-Cameron requests that the Commission sever the Boalsburg, Clearfield, Renovo, and St. Marys proposals from the balance of this proceeding. Since this proceeding is being terminated herein, this request is now moot.

[3] *See* Letter to Chief, FM Branch, from Louis J. Maierhofer, dated June 6, 1989.

Marketing requested the substitution of Channel 242B1 for Channel 228A at Jersey Shore, and the substitution of Channel 222A for Channel 242A at Lewisburg. In a supplemental pleading effecting a settlement of conflicts among other counterproposals in the proceeding, Pro Marketing requested the substitution of Channel 279A for Channel 242A at Lewisburg, noting that Channel 279A would require a different site than that specified in Town's pending application for construction permit. The *R&O* accepted this supplement and resolved all of the acceptable conflicting proposals in this proceeding, noting that Station WUNS(FM)'s construction permit was conditioned on the outcome of this docket.[4] Town had not participated at this stage of the proceeding.

4. *Petition for reconsideration.* Town states that it did not participate because it had no notice or warning that an order requiring it to change its transmitter site was possible as a result of this proceeding. Town contends that the construction of its facility at Lewisburg was undertaken with the understanding that any channel change would permit operation at its current site. It states further that it has expended over $260,000.00 in construction costs for WUNS(FM). Town argues that the Commission was required to provide it with actual notice of the possible channel and site change pursuant to Section 554(b)(3) of the Administrative Procedure Act and *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990). Town also argues that because Station WUNS(FM) is an existing station, the Commission should have required a compelling showing before ordering it to change its transmitter site. Finally, Town argues that, consistent with its rejection of Brockway Broadcasters's counterproposal for procedural deficiencies in this proceeding, the *R&O* should not have considered Pro-Marketing's counterproposal because Pro-Marketing failed to certify that it would reimburse the licensees of affected stations at Lock Haven and Clearfield, Pennsylvania for their expenses in changing channels.

5. In opposition to the petition for reconsideration, Covenant, Pro Marketing and Boalsburg state that while they support the allotment of a channel at Lewisburg, they dispute Town's assertion of any rights as the permittee of an existing station, because Station WUNS(FM) was granted a conditional construction permit. Therefore, they claim, Town had sufficient notice of any possible change of channel and/or site. They further argue that Town was fully apprised that any construction was undertaken at its own risk.

6. Pro Marketing's opposition argues that Town was not entitled to service of any pleadings during the pendency of this docket because Town's construction permit was granted on January 30, 1990, over a year after the pleading cycle closed on December 27, 1988. Pro Marketing suggests in the alternative that Town could operate on Channel 279A at its present facility. Pro Marketing points out that short spacings would result to Station WKAB(FM)(formerly WZWB(FM)), Channel 278A, Berwick, Pennsylvania, and to Station WQNY(FM), Channel 279B, Ithaca, New York, as well as to the reference coordinates for the vacant allotment of Channel 280A at Laporte, Pennsylvania. It argues that the Berwick and Ithaca short spacings could be accommodated after an application for Channel 279A at Lewisburg is filed, and the allotment at Laporte is still vacant and subject to possible amendment.[5] It includes a copy of a September 13, 1991 letter from Robert J. Meisey, owner of the Berwick station, addressed to Louis J. Maierhofer in which Mr. Meisey states that he is willing to enter into a mutual interference agreement with Mr. Maierhofer to allow Station WUNS's operation on Channel 279A at Station WUNS's current location on the condition that Station WKAB is allowed to upgrade to the equivalent of 6 kilowatts effective radiated power at a height above average terrain of 100 meters.

7. Town's consolidated reply addresses Pro Marketing's suggestion that it operate on Channel 279A at its present facility, and includes an engineering report in support of the suggestion. Town notes that the Laporte short-spacing could be eliminated by the imposition of a further site restriction of 1.8 kilometers (1.1 miles) northeast on the Laporte allotment. Second, Town states that pursuant to Section 73.215 of the Commission's Rules, it can protect Station WQNY(FM) Ithaca, New York. Third, Town refers to the letter from the Berwick licensee and states that it will include a statement on its Form 301 that WUNS(FM) will accept interference from a 6 kW Berwick facility. Town claims that an agreement between it and the Berwick licensee in which Station WKAB is permitted to increase power to 6 kW, will avoid the 8 kilometer (5 mile) short spacing limit under Section 72.215(e). Finally, Town requests that the Commission grant it permission to file an application to provide further detail on the short spacings.

8. *Discussion.* After careful consideration of the pleadings filed in this proceeding, we will dismiss the petition for reconsideration pursuant to Section 1.429(b). Town's arguments that the Commission failed to serve Town notice of the proposed site change,[6] and that the Commission erroneously accepted the Pro Marketing counterproposal[7]

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[4] Also considered were counterproposals filed by Lori L. Michael requesting an allotment at Duncansville, Pennsylvania, which was later withdrawn, and Valley Radio, requesting an allotment at Mill Hall, Pennsylvania. Counterproposals filed by Edward C. DeHart and Brockway Broadcasters were found to be defective and were not considered.

[5] An application (File No. BPH-910926MH) for a construction permit for the allotment at Laporte has since been filed by Theodore J. Saul, Jr., during the filing window opened in this proceeding.

[6] Pursuant to Section 1.401(d), the Commission is required to serve licensees and permittees whose channel would be changed by a grant of the petition for rule making, but not applicants. Contrary to its argument, Town, as a conditioned permittee, held the status of an applicant, not permittee, throughout the proceeding. *See Bayou Vista and Franklin, Louisiana*, 34 RR 2d 1540 (1975).

[7] The Pro Marketing counterproposal was not given disparate treatment from the Brockway Broadcasters counterproposal. Although Pro Marketing failed to include a commitment to reimburse the licensees at Clearfield and Lock Haven for their expenses in changing channels, this failure was cured by the inclusion of such a statement in Pro Marketing's reply comments. Brockway Broadcasters never filed a similar curative statement. While we require that all counterproposals be technically and procedurally correct when filed, *see, e.g., Broken Arrow and Bixby, Oklahoma, Coffeyville, Kansas*, 3 FCC Rcd 6507 (1988), we do not absolutely prohibit minor curative submissions. *See, e.g., Scottsboro, Alabama, Trenton, Georgia, and Signal Mountain, Tennessee*, 6 FCC Rcd 6111 (1991). We see no

do not relate to events or circumstances which have changed since the last opportunity to present them to the Commission pursuant to Section 1.429(b)(1). Furthermore, Town has failed to show that these facts were unknown to it until after the last opportunity to present them, and that it could not, through the use of ordinary diligence, have learned of the facts in question prior to such opportunity, pursuant to Section 1.429(b)(2). Although Town was not served by any of the parties in this proceeding, Town's June 6, 1989 letter to the Commission clearly indicates that Town was aware of the Pro Marketing counterproposal and the possibility that this docket could affect Town's authorization. That letter specifically cited to Pro Marketing's counterproposal and then solicited a conditional grant of its construction permit for Station WUNS(FM), by stating that it "would change operation from Channel 242A at such time as the Commission may require." Further, the condition on Town's construction permit cited Docket 88-496 and notified Town that any construction undertaken was done at its "sole risk." The condition was general and did not limit potential changes to Town's construction permit to the substitution of Channel 222A for Channel 242A at Lewisburg. Since the Pro Marketing supplement proposing the alternate channel substitution of Channel 279A at Lewisburg was part of this docket prior to the grant of Town's conditioned construction permit, Town could have learned through the use of ordinary diligence that it could be required to change transmitter site. Furthermore, pursuant to Section 1.106(a)(2), Town could have filed a petition for reconsideration and requested a hearing challenging the terms of the construction permit's grant, and did not do so. Accordingly, we find that Town's arguments herein are untimely and cannot serve as bases for reconsideration pursuant to Section 1.429(b)(1) and (2). *See e.g., Whidbey Broadcasting Service, Inc. (KJTT(AM))*, 4 FCC Rcd 8726 (1989) (A party who fails to use ordinary diligence in collecting information cannot use the late discovery of that information as the basis of its petition for reconsideration).

9. We also find that Town has failed to show that consideration of these facts would serve the public interest pursuant to Section 1.429(b)(3). While we seek to accommodate requests such as Town's because it is generally in the public interest to protect parties' investments, to do so in this case would require that the comprehensive settlement in this proceeding be unraveled in order to accommodate Town's site and protect its investment. We believe that such an action would not serve the public interest where, as here, the investment was made under circumstances in which the investor had no legitimate expectation that the Commission would protect the transmitter site. Our action complied fully with our precedent which affords the Commission the flexibility to use substitute channels to resolve conflicts between mutually exclusive proposals. *See Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990). Although Pro Marketing's counterproposal originally proposed the substitution of Channel 222A for Channel 242A at Lewisburg, a Commission engineering analysis based on Pro Marketing's proposed resolution determined that the substitution of Channel 279A at Lewisburg removed the conflicts among several proposals, ultimately permitting the grant of four upgrades and the creation of two new allotments. Further engineering analysis indicates that there are no other channels available for allotment at Lewisburg which would meet spacing requirements at the Station WUNS transmitter site. To accommodate Town's request would require the denial of other proposals that were filed in accordance with our Rules. Accordingly, we find that Town has failed to satisfy any of the three prongs of Section 1.429(b) of the Rules with respect to the merits of the *R&O* in this proceeding. *See Santa Margarita and Guadalupe, California*, 4 FCC Rcd 7887 (1989), *affirmed*, 7 FCC Rcd 4552 (1992); *Mt Morris and Savanna, Illinois; Belle Plaine, et al., Iowa*, 5 FCC Rcd 2683 (1990). *See also Whidbey Broadcasting Service, Inc.*, 4 FCC Rcd 8726 (1989); *Direct Broadcast Satellite Service*, 53 RR 2d 1637 at 1641-42 (1983).

10. Although we will not consider Town's petition for reconsideration pursuant to Section 1.429(b), we have examined the merits of its alternative suggestion that it be allowed to continue to operate on Channel 279A at its present site resulting in three short spacings to stations in Pennsylvania and New York. However, that alternative suggestion also does not comply with the Commission's Rules. Town states that one of the three short spacings that would result from its operation on Channel 279A at its present site can be cured by changing the reference coordinates for Channel 280A at Laporte. A Commission engineering analysis confirms that this change will cure the short spacing.[8] This change in reference coordinates will not affect the pending application for Channel 280A at Laporte (File No. BPH-910926MH). Had we been aware of this alternate site, we would have allotted Channel 280A at Laporte at the non-conflicting site in the *R&O*. As for the short-spacing to the Ithaca station, based on the information before us, it appears that Town's proposal may be acceptable pursuant to Section 73.215 of the Rules. With respect to the short spacing to the Berwick station, however, an engineering analysis shows that the required separations pursuant to Section 73.213(c) cannot be met, and that any proposal filed with a Form 301 would require a waiver of Section 73.213(c) of the Rules. The September 13, 1991 letter to Town from the Berwick licensee indicates that the Berwick licensee would only be willing to sign an agreement which would allow Berwick to upgrade to 6 kilowatts. Since this condition cannot be met because the agreement would not comply with the rules governing such agreements, we give the agreement no weight. We make no determination as to the merits of Town's proposed waiver request should one be filed on an FCC Form 301. However, without such a request, we cannot consider Town's proposal further.

11. Accordingly, the petition for reconsideration filed by Louis J. Maierhofer, d/b/a Town, Gown and Country Radio IS DISMISSED.

12. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

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reason to reject a counterproposal for failure to include a reimbursement commitment when that failure is cured and acceptance of the counterproposal would not require the denial of another proposal before us in the proceeding and no prejudice would result to the licensees entitled to reimbursement.

[8] The *R&O* allotted Channel 280A at Laporte at coordinates 41-25-24 and 76-29-42. The new coordinates for Channel 280A at Laporte, Pennsylvania, are 41-26-20 and 76-28-35.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink, Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-164

In the Matter of

Amendment of Section 73.202(b),	RM-6814
Table of Allotments,	RM-6926
FM Broadcast Stations.	RM-7706
(St. Augustine, St. Augustine Beach,	RM-7707
and Gainesville, Florida)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 29, 1992; Released: November 24, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Gillen Broadcasting Corporation ("Gillen"), licensee of Station WYKS, Channel 288A, Gainesville, Florida, directed to the *Report and Order* in this proceeding. 7 FCC Rcd 4138 (1992). WSOS, Inc., licensee of Station WSOS, Channel 288A, St. Augustine, Florida, filed a "Contingent Opposition to Petition for Reconsideration and Request for Waiver of Section 1.420(f) or Establish a Separate Proceeding to Consider Gillen's Request."[1] Gillen filed "Comments in Support of Petition for Reconsideration and Request for Expedited Action." C&S Broadcasting filed a Reply directed to the Comments in Support of Petition for Reconsideration and Request for Expedited Action. For the reasons discussed below, we are granting the Petition for Reconsideration to the extent of substituting Channel 287A for Channel 288A at Gainesville, Florida, and modifying the license of Station WYKS to specify operation on Channel 287A.

2. *Background.* This proceeding began with the filing of two separate petitions for rule making. The first petition for rule making was filed by Kyle E. Magrill proposing the allotment of Channel 231A to St. Augustine Beach, Florida, as a first local service. The second petition for rule making was filed by First City Broadcasting, Inc., former licensee of Station WSOS, Channel 288A, St. Augustine, Florida, proposing the substitution of either Channel 288C3 or Channel 231C3 for Channel 288A at St. Augustine, and modification of its Station WSOS license to specify operation on a higher class channel.[2] In order to accommodate a Channel 288C3 upgrade at St. Augustine, the petitioner also proposed the substitution of Channel 287A for Channel 288A at Gainesville, Florida, and modification of the license of Station WYKS to specify operation on Channel 287A.

3. The *Report and Order* in this proceeding allotted Channel 288A to St. Augustine Beach as a first local service, and upgraded Station WSOS to specify operation on Channel 231C3 at St. Augustine. In addition, the *Report and Order* denied the proposed substitution of Channel 287A for Channel 288A at Gainesville, and modification of the Station WYKS license. The basis for that denial was that a Channel 287A allotment at Gainesville would create additional interference to Station WYOC, Channel 285A, High Springs, Florida.

4. In support of its Petition for Reconsideration, Gillen argues that there is no basis in the Commission's Rules to warrant a determination that the proposed Channel 287A substitution would increase interference to Station WYOC. In view of the fact that Station WYKS and Station WYOC are existing short-spaced stations, Gillen contends that under Section 73.215(a)(2) of the Rules, there would be no adverse impact on Station WYOC resulting from the proposed substitution.

5. *Discussion.* We are granting the Petition for Reconsideration to the extent of substituting Channel 287A for Channel 288A at Gainesville, and modifying the license of Station WYKS to specify operation on Channel 287A.[3] At the outset, we note that Station WYKS is currently short-spaced to third adjacent channel Station WYOC (25.7 kilometers instead of the 31 kilometers required by the Commission's Rules). The minimum spacing requirements set forth in Section 73.207(b) and Section 73.213(c)(2) of the Rules do not distinguish between second and third adjacent Class A FM allotments.[4] In view of the fact that Section 73.209 of the Rules expressly limits the nature and extent of interference protection to the degree of protection afforded by the applicable spacing requirements, there was no basis to distinguish between a Channel 287A allotment and a Channel 288A allotment at Gainesville with respect to Station WYOC. The confusion in this matter appears to emanate from the Commission action in *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 4 FCC Rcd 1681 (1989). In that action, the Commission adopted rules to protect short-spaced FM stations from interference. Those rules were based on the interference standards used in the noncommercial educational FM band. Specifically, the educational rules contain a 20 dB protection ratio for second adjacent FM channels and a 40 dB protection ratio for third adjacent channel FM channels. At one time, these protection ratios were reflected in Section 73.215(a)(2) of the Rules with respect to commercial FM stations. However, upon reconsideration, the Com-

[1] Section 1.420(f) of the Rules provides for an automatic stay of a change in channel when a petition for reconsideration is filed. In view of our action resolving this proceeding, it is not necessary to consider the request for waiver of Section 1.420(f) or consider the Gillen matter in a separate proceeding.

[2] On May 15, 1990, the Station WSOS license was assigned to WSOS, Inc.

[3] The reference coordinates for the Channel 287A allotment at Gainesville, Florida, are 29-37-52 and 82-25-18. This site is 9.4 kilometers (5.9 miles) west of Gainesville.

[4] Section 73.207(b) requires a minimum separation of 31 kilometers between both second adjacent Class A FM stations and third adjacent Class A FM stations. Section 73.213(c)(2) reflects the FM spacing requirements that were in effect prior to October 2, 1989. In this regard, Section 73.213(c)(2) requires a minimum separation of 27 kilometers between both second adjacent channel FM stations and third adjacent channel FM stations.

mission determined that there was no basis to impose the stricter 20 dB protection ratio on second adjacent channel commercial FM stations. Accordingly, Section 73.215(a)(2) of the Rules was amended to specify a 40 dB protection ratio for both second adjacent channel FM stations and third adjacent channel FM stations. 6 FCC Rcd 5356 (1991). Using a 40 dB protection ratio in connection with the Channel 287A allotment at Gainesville, this substitution would not cause additional interference to second adjacent channel Station WYOC, High Springs, Florida.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 8, 1993,** the Table of FM Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED as follows:

Community	Channel Nos.
Gainesville, Florida	265A, 279C1, 287A

7. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Gillen Broadcasting Corporation for Station WYKS, Gainesville, Florida, IS MODIFIED to specify operation on Channel 287A in lieu of Channel 288A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in BLH-4780 except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-4780 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waivers of Section 90.621(b)
of the Commission's Rules
for Applicants in the Specialized
Mobile Radio Service

ORDER

Adopted: November 13, 1992; Released: November 16, 1992

By the Chief, Private Radio Bureau:

1. On July 19, 1991, the Commission adopted rules to permit applicants for Specialized Mobile Radio (SMR) stations to locate their base station transmitters closer than the standard co-channel mileage separation distances (this is commonly referred to as "short-spacing").[1] The *Order* in PR Docket No. 90-34 codified two methods of short-spacing SMR facilities. The first method is referred to as "consensual short-spacing" and permits an applicant to short-space by submitting written consent from all co-channel licensees located less than 70 miles from the coordinates of the proposed facilities. The second method is short-spacing in accordance with a short-spacing table in Section 90.621(b)(4) of the Rules, 47 C.F.R. § 90.621(b)(4). The separation distances in the short-spacing table were calculated using 40/22 dBu criteria. Although this 40/22 dBu standard was used to calculate distances for the short-spacing table, the *Order* also clarified that a 40/30 dBu standard was used to calculate the normal separation distance and that the 40/30 dBu standard continues to be the standard under which short-spacing waiver requests would be evaluated. On August 4, 1992, the Commission adopted a *Memorandum Opinion and Order* in PR Docket No. 90-34 affirming its previous *Order*. [2]

2. Recently, we have received numerous waiver requests to short-space SMR facilities, some of which are based on the 40/30 dBu criteria and some of which are based on the 40/22 dBu criteria.[3] Many of these waiver requests, particularly those based on the 40/30 dBu criteria, have been opposed by existing affected licensees that claim that unacceptable interference will be caused to their facilities. The Commission must evaluate each of these requests for waiver individually and, in instances where a showing is disputed, several engineering showings must often be evaluated. Such extensive evaluation is a time consuming process and strains the Commission's scarce resources.

3. In addition, Motorola, Inc. (Motorola), on October 21, 1992, filed a Petition for Partial Further Reconsideration of the *Memorandum Opinion and Order* in PR Docket No. 90-34. Motorola raises a number of questions on the issue of what criteria should be used to provide sufficient co-channel protection to SMR facilities and requests that we defer action on any waiver requests that are based on the 40/30 dBu standard while this issue is being considered. Also of concern, the Commission has pending before it several petitions to modify the general licensing procedures for the 800 MHz spectrum, including a petition filed by the National Association of Business and Educational Radio, Inc. proposing to change the co-channel criteria used to license facilities using Business and General Category channels from 40/30 dBu to 40/22 dBu.[4] The number of disputed waiver requests along with the questions raised in these petitions have lead us to conclude that the issue of adequate co-channel protection for 800 MHz facilities can only be addressed in the context of a comprehensive rule making proceeding.

4. For the reasons discussed above, we find that it is in the public interest to refrain from granting any requests for waiver of Section 90.621(b) of the Commission's rules until the issues raised regarding sufficient co-channel protection can be resolved in a rule making proceeding.[5] Any applications received after the adoption date of this *Order* requesting waiver of Section 90.621(b) will be returned without action. We shall, however, evaluate requests for waiver of Section 90.621(b) that have been filed with the Commission prior to the adoption date of this *Order*.

5. As discussed above, IT IS HEREBY ORDERED that, effective 12:01 AM EST the day after the adoption date of this *Order* and until otherwise notified, applications received that request a waiver of Section 90.621(b) of the Commission's rules will be returned without action.

6. For further information concerning this *Order*, contact Steve Sharkey, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

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[1] *Report and Order*, PR Docket No. 90-34, 6 FCC Rcd 4929 (1991).

[2] *Memorandum Opinion and Order*, PR Docket No. 90-34, 7 FCC Rcd 6069 (1992).

[3] Those waiver requests that are premised on non-overlap of the 40/22 dBu contours do not reference the short-spacing table, but instead are based on the actual facilities of existing and proposed stations.

[4] *See*, RM-8028, RM-8029, RM-8030, *Public Notice* Report No. 1899, released July 13, 1992. *See also*, Petition for Rule Making filed October 26, 1992, by the American Mobile Telecommunications Association, Inc.

[5] The grant of waivers by the Commission is discretionary in nature. *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-326

In the Matter of

Capital Network Systems, Inc.

ORDER
Proceeding Terminated

Adopted: November 10, 1992; Released: November 12, 1992

By the Chief, Common Carrier Bureau:

1. On November 4, 1991, the Common Carrier Bureau released orders directing certain operator service providers (OSPs), including Capital Network Systems, Inc. (CNS), to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On November 9, 1992, CNS filed revisions to its informational tariff which reduce its rates substantially. CNS's November revisions represent a reduction of approximately 14 percent from the highest total charge Annex had reported earlier. It was on the basis of the rates CNS had in effect at the time of the November 4 Order, that the Bureau found that CNS's rates appeared to be unjust and unreasonable. CNS no longer charges the rates that prompted this proceeding. CNS therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-326 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] *See, e.g.*, In the Matter of Capital Network Systems, Inc., 6 FCC Rcd 6707 (Com.Car.Bur. 1991).
[2] We emphasize that this order does not represent an affirmative finding that CNS's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 16, 1992

EXPANDED INTERCONNECTION FILING DATE ESTABLISHED FOR OPPOSITIONS TO STAY PETITIONS

CC DOCKET NO. 91-141

On October 19, 1992, the Commission released a Report and Order and Notice of Proposed Rulemaking in *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 (FCC 92-440) (Report and Order). A number of parties have filed petitions to stay, at least in part, the effect of the Report and Order. These filings include: (1) the "Joint Petition for Stay Pending Judicial Review, or, in the Alternative, for Stay Pending Agency Reconsideration" filed on November 10, 1992 by nine Tier 1 Local Exchange Carriers (LECs) (Joint Petition); (2) "Petition for Stay Pending Reconsideration or Appeal" filed on November 10, 1992 by Bell Atlantic; and (3) "Petition of the Ameritech Operating Companies for Stay Pending Reconsideration or Appeal" filed on November 13, 1992.

The Joint Petition requests that the Commission stay the mandatory physical collocation, virtual collocation and related tariffing requirements of the Report and Order on condition that LECs offer physical or virtual collocation at individual central offices in response to bona fide requests. The Bell Atlantic Petition requests that the Commission stay the "fresh look" provisions of the Report and Order. The Ameritech Petition requests that the Commission stay the mandatory physical collocation requirements of the Report and Order.

Oppositions to these petitions to stay are to be filed by Friday, November 20, 1992 with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Parties may respond to all three petitions in a single pleading. Parties also should send copies of oppositions to Linda L. Haller, Policy and Program Planning Division, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554 and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions to stay can be obtained from Downtown Copy Center at 202-452-1422.

This remains a non-restricted rulemaking proceeding for purposes of the Commission's *ex parte* rules. *Ex parte* presentations are permitted, except during any Sunshine Agenda period, provided they are disclosed as described in the Commission's rules. *See* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206. For further information, contact Linda L. Haller (202-632-1298) or Claudia R. Pabo (202h)632-4049), Policy and Program Planning Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-330

In the Matter of

International Pacific, Inc.

ORDER
Proceeding Terminated

Adopted: November 10, 1992; Released: November 12, 1992

By the Chief, Common Carrier Bureau:

1. On November 8, 1991, the Common Carrier Bureau released orders directing certain operator service providers (OSPs), including International Pacific, Inc. (IPI), to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On November 2, 1992, IPI filed revisions to its informational tariff which reduce its rates substantially. IPI's revisions represent a reduction of approximately 15 percent from the highest total charges IPI had reported earlier. It was on the basis of the rates IPI had in effect at the time of the November 8 Order, that the Bureau found that IPI's rates appeared to be unjust and unreasonable. IPI no longer charges the rates that prompted this proceeding. IPI therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-330 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] *See e.g.*, In the Matter of International Pacific, Inc., 6 FCC Rcd 6733 (Com.Car.Bur. 1991).
[2] We emphasize that this order does not represent an affirmative finding that IPI's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-372

In the Matter of

Pay Com, Inc.

ORDER
Proceeding Terminated

Adopted: November 10, 1992; Released: November 12, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, the Common Carrier Bureau released orders directing certain operator service providers (OSPs), including Pay Com, Inc. (Pay Com), to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226 (h)(2).

2. Pay Com did not respond to the December 23 Order, and attempts to contact the OSP have failed.[2] We therefore conclude that Pay Com has ceased to operate and, accordingly, terminate the captioned proceeding.

3. Therefore, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-372 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] *See e.g.*, In the matter of Pay Com, Inc., 7 FCC Rcd 207 (Com.Car.Bur. 1992).

[2] Attempts to contact Pay Com by telephone at the number originally provided by the carrier have failed. Directory assistance has no listing for Pay Com, Inc. Additionally, we received no response to inquiries sent via registered mail.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-366

In the Matter of

American Public
Communications, Inc.

ORDER
Proceeding Terminated

Adopted: November 10, 1992; Released: November 12, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, the Common Carrier Bureau released orders directing certain operator service providers (OSPs), including American Public Communications, Inc. (APC), to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226 (h)(2).

2. APC did not respond to the December 23 Order, and attempts to contact the OSP have failed.[2] We therefore conclude that APC has ceased to operate and, accordingly, terminate the captioned proceeding.

3. Therefore, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-366 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] *See e.g.*, In the matter of American Public Communications, 7 FCC Rcd 169 (Com.Car.Bur. 1992).

[2] Attempts to contact APC by telephone at the number originally provided by the carrier have failed. Directory assistance has no listing for American Public Communications, Inc. Additionally, we received no response to inquiries sent via registered mail.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-370

In the Matter of

Ju-Le Corporation

ORDER
Proceeding Terminated

Adopted: November 10, 1992; Released: November 12, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, the Common Carrier Bureau released orders directing certain operator service providers (OSPs), including Ju-Le Corporation (Ju-Le), to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226 (h)(2).

2. Ju-Le responded to the December 23 Order by letter of January 27, 1992, stating that "phone traffic" would be "sent to a certified third party carrier." Ju-Le, in the same letter, stated that it was withdrawing its tariff.[2] Other information indicates that Ju-Le is no longer in business.[3] We therefore conclude that Ju-Le has ceased to operate and, accordingly, terminate the captioned proceeding.

3. Therefore, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-370 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] *See e.g.*, In the matter of Ju-Le Corporation, 7 FCC Rcd 194 (Com.Car.Bur. 1992).

[2] January 27, 1992 letter from Raymond E. Jusseaume, Treasurer, Ju-Le Corporation, (filed in CC Docket No. 91-370).

[3] There is no telephone directory listing for Ju-Le. Additionally, we have received no reply to our inquiry concerning the business status of Ju-Le sent via registered mail.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-201

In re Applications of

SCOTT M. TRENTADUE File No. BPH-900604MA

FREDERICK W. KINLOW d/b/a F.W.K. BROADCASTING COMPANY File No. BPH-900606MF

For Construction Permit for a New FM Station on Channel 293A at Whitewater, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1992; Released: November 27, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. Pending before the Review Board are the appeal of Frederick W. Kinlow d/b/a F.W.K. Broadcasting Company (FWK) filed May 5, 1992; comments filed by Scott M. Trentadue on May 12, 1992, and by the Commission's Mass Media Bureau on May 20, 1992; a joint request for approval of settlement agreement filed October 1, 1992,[1] an erratum filed October 5th, and supplements filed October 8th and November 6th; and the Bureau's comments filed November 2, 1992, and November 13th. There is also pending before the Commission in this proceeding an application for review filed by FWK on May 5, 1992. (*See* para. 2, *infra.*)

2. FWK appeals the dismissal of its application and an earlier settlement request (whereby FWK would receive the construction permit) by Administrative Law Judge Joseph Chachkin (ALJ). The ALJ's dismissal of FWK was predicated on that applicant's untimely payment of the Commission's hearing fee. *Memorandum Opinion and Order*, FCC 92M-432, released April 6, 1992.[2] This action was pursuant to a letter ruling by the Commission's Managing Director denying FWK's request for a waiver of the hearing fee deadline. *Fee Decisions*, 7 FCC Rcd 2414 (1992).[3] FWK argues to the Board that the ALJ's actions were premature in light of FWK's concurrent appeal to the Commission of the Managing Director's letter ruling. The Board initially responded with an order holding in abeyance further action on FWK's instant appeal pending the Commission's resolution of the application for review. *Scott M. Trentadue*, 7 FCC Rcd 3308 (Rev. Bd. 1992). FWK's application for review remains pending at this time.

3. The instant joint request for approval of settlement agreement contemplates the dismissal of FWK's application and pending appeal and application for review in return for reimbursement of its expenses, not to exceed $20,000, by Trentadue, and the grant of Trentadue's application. The request supersedes the parties' earlier settlement effort and renders moot FWK's appeal of the ALJ's dismissal of the prior joint settlement request. The Bureau supports the proposed settlement and reimbursement of $20,000 to FWK, despite its dilatoriness in filing the agreement and verification of expenses.

4. Settlement agreements among broadcast construction permit applicants are governed by Section 73.3525 of the Commission's Rules, 47 CFR § 73.3525, which implements 47 U.S.C. § 311(c). In accordance therewith, the parties have furnished copies of their settlement agreement together with the appropriate declarations under penalty of perjury providing that their applications were not filed for the improper purpose of reaching settlement, that consideration is limited to the legitimate and prudent expenses of the dismissing applicant, and that their agreement is in the public interest because it will hasten the inauguration of new FM service to Whitewater, Wisconsin. In addition, FWK has submitted an itemized accounting and documentation of the expenses incurred in its pursuit of the permit, and for which it seeks reimbursement. These expenditures total $25,082.64 and include $10,322.64 for legal services, $5,970.00 for engineering services, and $8,790.00 for FCC fees.[4]

5. We are in agreement with the Bureau and find that the public interest would be served by grant of the proposed settlement. The ALJ determined below that Trentadue is basically qualified to be a Commission licensee. FWK has demonstrated that it will recover an amount that will not exceed its legitimate and prudent expenses in preparing and prosecuting its application.

6. ACCORDINGLY, IT IS ORDERED THAT, The Joint Request for Approval of Settlement Agreement, filed October 1, 1992, as corrected on October 5, 1992, and as supplemented on October 8, 1992 and November 6, 1992, IS GRANTED; that the attached Agreement IS AP-

[1] The joint request for approval of settlement agreement was originally submitted to the Commission. The Commission's Office of General Counsel has informally referred the matter to the Board for disposition.

[2] FWK's application was accepted for filing soon after the Commission shortened the deadline for hearing fee payments as part of its overall reform of the hearing process. *See Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157 (1990), *recon. granted in part*, 6 FCC Rcd 3403 (1991). FWK, claiming that it was unaware of the rule change, remitted its hearing fee on the Notice of Appearance deadline, the date the fee would have been due under the prior rules. FWK Appeal at 1-2.

[3] The ALJ had initially accepted FWK's late fee payment. *Memorandum Opinion and Order*, FCC 91M-2682, released Aug. 30, 1992. Trentadue sought extraordinary relief from this ruling and the Board, having no jurisdiction over fee questions, referred the matter to the Managing Director's Office. *Scott M. Trentadue*, 6 FCC Rcd 6540 (Rev. Bd. 1991).

[4] The agreement further provides that should FWK's hearing fee payment be refunded, FWK will return $6,760.00 of the settlement proceeds to Trentadue. FWK reports that it filed a refund request with the Managing Director on Oct. 5, 1992. FWK Second Supplement at n.1.

PROVED; that the Appeal of Frederick W. Kinlow d/b/a F.W.K. Broadcasting Company filed May 5, 1992 IS DISMISSED; that the application of Frederick W. Kinlow d/b/a F.W.K. Broadcasting Company (File No. BPH-900606MF) for a new FM broadcast station at Whitewater, Wisconsin, IS DISMISSED; and that the competing application of Scott M. Trentadue (File No. BPH-900604MA) IS GRANTED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[5] In light of this ruling, we note additionally that FWK's pending application for review is subject to dismissal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-172

In the Matter of

Amendment of Section 73.202(b), RM-6894
Table of Allotments,
FM Broadcast Stations.
(Castle Rock, Colorado Springs,
Frisco, and Salida, Colorado;
Raton, New Mexico)[1]

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 30, 1992; Released: November 25, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* ("*Notice*") in this proceeding, 4 FCC Rcd 5357 (1989), which proposed to substitute Channel 232C3 for Channel 232A at Raton, New Mexico, and to modify the license for Station KRTN-FM, Channel 232A, Raton, to specify operation on the higher class channel.[2] Century Broadcasting Corporation ("Century"), licensee of Station KYBG-FM, Channel 221A, Castle Rock, Colorado, filed a counterproposal to substitute Channel 221C2 for Channel 221A at Castle Rock and to modify Station KYBG-FM's license accordingly.[3] To accommodate this proposal, Century proposes the substitution of Channel 230A for Channel 221A at Frisco, Colorado, and modification of the license for Station KYSL(FM), Frisco, accordingly; the substitution of Channel 222A or Channel 222C3 for Channel 221A at Salida, Colorado, and modification of the license for Station KVRH FM, Salida, to specify operation on either channel; the substitution of Channel 232C for Channel 230C at Colorado Springs, Colorado, and modification of the license for Station KILO-FM, Colorado Springs, accordingly; and the substitution of Channel 229C2 for Channel 232A at Raton, New Mexico, in lieu of Channel 232C3 as proposed in the *Notice* and the modification of Station KRTN-FM's license accordingly. Since Century had obtained the consent of only two of these stations to the proposed channel substitutions and license modifications, we also issued *Orders To Show Cause*, 7 FCC Rcd 2967 (1992), to Station KYSL(FM), Frisco, Colorado, and to Station KILO-FM, Colorado Springs, Colorado, as to why their licenses should not be modified to specify operation on Channel 230A and Channel 232C, respectively.

2. The Federal Aviation Administration ("FAA") submitted comments in response to the *Notice*.[4] [5] In response to the Public Notice soliciting reply comments on Century's counterproposal, both Century and William J. Murphy, former licensee of Station KVRH-FM, Salida, Colorado,[6] filed comments supporting the counterproposal.[7] Colorado Springs Radio Broadcasters, Inc. ("CSRB"), licensee of Station KILO-FM, Channel 230C, Colorado Springs, Colorado, and Krystal Broadcasting, Inc. ("Krystal"), licensee of Station KYSL(FM), Channel 221A, Frisco, Colorado, jointly filed comments opposing the counterproposal.[8] [9] Thereafter, in response to the *Orders To Show Cause*, Krystal and CSRB separately filed objections to the proposed license modifications, and Century filed a response.

THE PLEADINGS

3. In their pleadings, CSRB and Krystal contend that Century's counterproposal should be denied for two reasons. First, they allege that it violates the Commission's policy established in *Columbus, Nebraska*, 59 RR 2d 1184 (1986), that, in the absence of special factors, the Commission will not entertain proposals for changes in the FM Table of Allotments which involve more than two other

[1] The communities of Castle Rock, Colorado Springs, Frisco, and Salida, Colorado, have been added to the caption.

[2] The *Notice* in MM Docket No. 89-172 *et al.* proposed, on the Commission's own motion, to reclassify Class A FM allotments in 149 communities to Class C3 channels an to modify their authorizations accordingly.

[3] Century's counterproposal was placed on Public Notice on October 10, 1989 (Report No. 1799).

[4] The FAA filed comments concerning this docket and other dockets initiated simultaneously. *See* 5 FCC Rcd 2152 (1990). The FAA's concerns will be treated consistent with the treatment afforded in other proceedings. 5 FCC Rcd 2152 n.4

[5] Although the *Notice* stated that a failure to file comments in support of a Class C3 upgrade could lead to dismissal of that proposal, Station KRTN-FM, Raton, New Mexico, did submit, as an attachment to Century's counterproposal, an expression of interest in the substitution of Channel 229C2 for Channel 232A at Raton. As a result, we will consider the substitution of Channel 229C2, instead of Channel 232C3, at Raton.

[6] On January 18, 1990, the Commission approved a short-form assignment of license for Station KVRH-FM from William J. Murphy to All Heart Radio, Inc. (BALH-891211ED).

[7] Century filed two supplements to its comments. As we stated in the *Orders To Show Cause*, we will accept these pleadings.

[8] Both CSRB and Krystal request acceptance of their late filed joint comments because Century's counterproposal requires that their stations change frequencies and because their concerns relate to the Commission's overall policy in considering rulemaking petitions that require existing stations to change channels. In its response, Century argues that the joint comments should not be considered because they were filed 8 months late and do not show why CSRB or Krystal could not have participated in a timely fashion. We will, however, consider the joint comments because they were resubmitted on a timely basis and incorporated by reference by CSRB in response to our *Orders To Show Cause* in this proceeding. Moreover, acceptance of the pleading will create a full record for resolution of the issues.

[9] Colorado College, licensee of noncommercial educational Station KRCC(FM), Channel 218C2, Colorado Springs, Colorado, also objected to Century's counterproposal because the coordinates for the proposed upgrade at Castle Rock would be short-spaced to an application by Colorado College to upgrade the facilities of Station KRCC(FM) to Class C1. Thereafter, Colorado College withdrew its objection pursuant to a settlement agreement reached with Century under which Century agreed to use reference coordinates for the upgrade of its Castle Rock station that would not conflict with Station KRCC(FM)'s application. In light of this withdrawal, we need not discuss this objection.

substitutions of channels occupied by existing FM or TV stations. Since Century is proposing four channel substitutions to accommodate an upgrade for its Station KYBG-FM, Castle Rock, CSRB and Krystal believe that Century's counterproposal should not be considered. In addition, they contend that Century has not shown special factors -- such as service to unserved or underserved areas -- that may warrant a waiver of this policy.

4. Second, CSRB and Krystal argue that changing frequencies would have a severe adverse impact upon the stations and their listeners. In this regard, CSRB states that it has promoted its current frequency for 12 years and has achieved high ratings in its market which could be affected by changing its dial position. Furthermore, it contends that it will not be able to use its promotional material which identifies the station by its current dial position. Likewise, Krystal alleges that the livelihood of its station is based upon the listeners' identification of this station as "Krystal 92." Since the station has been on the air for only four years and has not yet achieved profitability, Krystal contends that requiring the station to change frequencies would cause confusion to listeners, would eradicate the station's previous efforts to promote itself as "Krystal 92," and would be harmful to the economic development of this station. However, if the Commission were to require the stations to change channels, Krystal requests that Century be ordered to pay approximately $75,000 to Krystal to cover the total costs for the changeover, including promotional costs. Similarly, CSRB asks that it not be required to change frequencies until Century has actually paid in cash to CSRB the agreed upon reimbursement amount and all other stations changing frequencies have completed all necessary steps to effectuate those changes and are ready to commence operations on their newly assigned channels.

5. In its response, Century contends that neither CSRB nor Krystal have advanced cognizable public interest reasons that would require denial of its counterproposal. First, Century argues that its counterproposal is in compliance with the Commission's channel substitution policy set forth in *Columbus, Nebraska*, 59 R.R. 2d 1184 (1986), because that policy only limits a rulemaking petitioner to two channel substitutions that have not been agreed to in advance of filing the petition. Since two of the four stations had previously agreed to the channel substitutions, Century contends that its counterproposal complies with the policy. Second, as to the alleged adverse impact on CSRB and Krystal for changing frequencies, Century reiterates that it intends to reimburse them for the reasonable costs incurred in connection with the proposed frequency changes in accordance with applicable Commission policy. It notes that it already has reached agreement with Station KVRH-FM, Salida, Colorado, and Station KRTN-FM, Raton, New Mexico, and will attempt to do so with the other two stations. However, Century states that it is aware of no Commission requirement that the agreed upon reimbursement amount be paid in cash in advance.

DISCUSSION

6. After carefully reviewing the pleadings, we believe that the public interest is best served by granting Century's counterproposal because this will result in upgrades for three FM stations in Castle Rock and Salida, Colorado, and Raton, New Mexico, and an expansion in the service areas of these stations. We also conclude that, for the reasons discussed below, CSRB and Krystal have not raised substantial and material questions of fact that would require a hearing on the proposed modifications of their licenses to specify operation on Channel 232C and Channel 230A, respectively.

7. *Columbus, Nebraska, Policy.* We do not believe that Century's counterproposal violates the policy set forth in *Columbus, Nebraska*, on the number of existing FM stations that may be required to change frequencies to accommodate one station's request for an expansion of its service area. In that case, the Commission instructed the staff, in the absence of special circumstances or agreement in advance by the affected stations, not to entertain rulemaking petitions to change the FM Table of Allotments if this would result in the more than two other substitutions of channels occupied by existing FM or TV stations.[10] Since Century had secured the consent of Station KVRH-FM, Salida, Colorado, and Station KRTN-FM, Raton, New Mexico, in advance of filing its counterproposal and documented this agreement in its counterproposal, we find that Century's counterproposal does not violate the *Columbus, Nebraska*, policy because it requires only two stations to change frequencies that have not already agreed to do so.[11]

8. *Disruption of Service.* We also believe that CSRB's and Krystal's arguments regarding disruption of service caused by changing channels do not justify a hearing on this issue and do not outweigh the public interest benefits in granting Century's counterproposal. While the Commission has recognized that changing the channels of existing stations creates a potential for a temporary disruption to the stations' listeners, we have also consistently held that this disruption of service does not outweigh the public interest benefit of providing service to additional population. *See, e.g., Churchville and Luray, VA*, 5 FCC Rcd 1106 (1990), *recon. denied*, 6 FCC Rcd 1313 (1991). This is particularly true in the instant case because grant of Century's counterproposal will result in upgrading three FM stations and expanding their service areas. Moreover, as indicated above, Century has agreed to reimburse both CSRB and Krystal for the reasonable costs that will be incurred in connection with the frequency change in accordance with Commission policy. This reimbursement includes costs for advertising promotion for the new frequencies which in turn may mitigate any temporary disruption in service to CSRB's and Krystal's listeners. *See Circleville, OH*, 8 FCC 2d 159, 164 (1967).

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[10] In *Columbus, Nebraska*, the Commission recognized that multiple channel substitutions involving existing stations can be time consuming and difficult to implement because they require obtaining the agreement of stations as to appropriate amounts for reimbursement. This in turn could constitute a waste of Commission resources if such a proposal, previously approved by the Commission, is not consummated. As a result, the Commission generally limited the staff's consideration of such proposals to those involving two stations changing channels unless there were prior agreement among the parties or special circumstances involved.

[11] Moreover, we note that not only have the Salida and Raton stations agreed to the frequency changes but also that they have reached agreement with Century regarding the expenses for which they will be reimbursed by Century.

9. *Reimbursement.* We decline to order Century to pay approximately $75,000 to Krystal to cover the total costs for the frequency change at this time. Determination of what constitutes legitimate and prudent expenses for reimbursement is left to the good faith negotiation of the parties, subject to Commission review if the parties are unable to reach agreement. *See, e.g., Mayfield and Wickliffe, KY*, 48 RR 2d 1232, 1235 (1981).[12] Likewise, we will not require Century to pay CSRB in advance for the expenses thatit will incur in changing frequencies because no showing has been made as to Century's inability to reimburse CSRB or the other stations. *See Columbus, NE*, 59 RR 2d 1185, 1186 (1989) and *Dickson, TN*, 4 FCC Rcd 8707 (1989). Absent a factual basis for questioning a party's financial ability to reimburse, we will leave matters such as the time and manner of reimbursement to the good faith negotiations of the parties. *See Dickson, TN, supra.* Finally, regarding CSRB's concern as to when it must change channels, our policy is that "it is generally not necessary for the change to take place until utilization of the existing frequency actually prevents a newly authorized station from inaugurating service." *See Albany, Buffalo, Ilion and Utica, NY*, 2 FCC Rcd 4300 (1987); and *Broken Arrow and Bixby, OK*, 4 FCC Rcd 6981 (1989).

10. *Technical Considerations.* A staff engineering analysis confirms that Century's proposed substitution of Channel 221C2 for Channel 221A at Castle Rock can be implemented consistent with the minimum distance separation requirements at a site 27.2 kilometers west of Castle Rock[13] if Channel 222C3 is substituted for Channel 221A for Station KVRH-FM, Salida, Colorado; Channel 230A for Channel 221A for Station KYSL(FM), Frisco, Colorado; Channel 232C for Channel 230C for Station KILO-FM, Colorado Springs, Colorado, and Channel 229C2 for Channel 232A for Station KRTN-FM, Raton, New Mexico.[14] Furthermore, because the proposed 1 mV/m contour of Channel 221C2 at Castle Rock would overlap the Grade B contour of Station KRMA-TV, Denver, Colorado, Century submitted a study showing that grant of the upgrade would not have a preclusive effect on the development of noncommercial stations on adjacent channels. We find that the original study and supplement indicate compliance with Section 1.420 of the Commission's Rules.

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 8, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Castle Rock, Colorado	221C2
Colorado Springs, Colorado	225C, 232C, 236C, 251C, 270C
Frisco, Colorado	230A
Salida, Colorado	222C3
Raton, New Mexico	229C2

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Century Broadcasting Corporation for Station KYBG-FM, Channel 221A, Castle Rock, Colorado, the license of All Heart Radio for Station KVRH-FM, Channel 221A, Salida, Colorado, and the license of Raton Broadcasting Company for Station KRTN-FM, Channel 232A, Raton, New Mexico, ARE MODIFIED to specify operation on Channel 221C2, Channel 222C3, and Channel 229C2, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission minor change applications for construction permits (Form 301), specifying the new facilities;

(b) Upon grant of the construction permits, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's Rules, the license of Krystal Broadcasting, Inc. for Station KYSL(FM), Channel 221A, Frisco, Colorado, and the license of Colorado Springs Radio Broadcasters, Inc., for Station KILO-FM, Channel 230C, Colorado Springs, Colorado, ARE MODIFIED to specify operation on Channel 230A and Channel 232C, respectively, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in licenses BLH-880602KA and BLH-7041 except for the channels specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, requires prior authorization for construction permit (FCC Form 301).

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[12] The Commission has provided guidelines on what constitutes legitimate and prudent expenses in *Circleville OH*, 8 FCC 2d at 163-164.

[13] The coordinates for Channel 221C2 at Castle Rock are 39-24-57 and 105-10-02. These coordinates are different from those proposed in the *Orders To Show Cause* for this channel. Colorado College and Century requested, as part of their settlement agreement, that we use the alternate coordinates. *See supra* note 9. Because this site is located within 80 kilometers (49.7 miles) of the Table Mountain Radio Receiving Zone, Boulder, Colorado, Century should refer to the provisions of Section 73.1030(b) of the Commission's Rules governing protection of the Commerce Department's radio receiving installations at this location.

[14] The coordinates for Channel 222C3 at Salida are 38-30-26 and 106-01-22, the location of the existing site for Station KVRH(FM). The coordinates for Channel 229C2 at Raton are 36-41-01 and 104-24-49, 24.5 km (15.2 miles) south of the community. The coordinates for Channel 230A at Frisco at the existing site for Station KYSL(FM) are 39-33-22 and 106-06-53. The coordinates for Channel 232C at Colorado Springs are 38-44-44 and 104-51-43, the existing site for Station KILO-FM.

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED that the transmission facilities comply in all respects with licenses BLH-880602KA and BLH-7041 except for the channels as specified above and license applications are filed within 10 days of the commencement of program tests.

14. IT IS FURTHER ORDERED, That the counterproposal filed by Century Broadcasting Corporation (RM-6894) IS GRANTED.

15. IT IS FURTHER ORDERED, That the Secretary SHALL SEND copies of this *Report and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Krystal Broadcasting, Inc., 6906 South Chapparal Circle West, Aurora, CO 80016; Colorado Springs Radio Broadcasters, Inc. 707 South Tejon, P.O. Box 2080; Colorado Springs, CO 80901, Raton Broadcasting Co., P.O. Box 638, Raton, NM 87740, and All Heart Radio, Inc., 7600 County Road 120, Salida, CO 81201.

16. IT IS FURTHER ORDERED, That the Secretary SHALL SEND copies of this *Report and Order* by first class mail to the following:

Paul A. Kastler,
Kastler and Kamm
P.O. Box 130
Raton, NM 87740
(Counsel to Raton Broadcasting Co.)

John C. Quale
James R. Bayes
Nancy J. Victory
Wiley, Rein and Fielding
1776 K Street, N.W.
Washington, DC 20006
(Counsel to Century Broadcasting)

Alfred C. Cordon
Cordon and Kelly
1920 N Street, N.W.
Washington, DC 20036
(Counsel to All Heart Radio, Inc.)

A. Thomas Carroccio
Santarelli Smith Kraut and Carroccio
1155 Connecticut Avenue, N.W.
Washington, DC 20036
(Counsel to Krystal Broadcasting)

Jeffrey W. Malickson
P.O. Box 32488
Charlotte, NC 28232
(Counsel to Colorado Springs Radio Broadcasters)

John M. Pelkey
Haley, Bader and Potts
2000 M Street, N.W.
Suite 600
Washington, DC 20036-4574
(Counsel to Colorado College)

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning the above, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

R. DONNIE GOODALE File No. BPH-890615MF

For a Construction Permit
for a New FM Station on
Channel 277A
in Lenoir, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 1992; Released: November 25, 1992

By the Commission:

1. In *R. Donnie Goodale*, 7 FCC Rcd 1495 (1992), the Commission denied a petition for reconsideration ("Petition I") filed December 31, 1990 by R. Donnie Goodale ("Goodale"). Now before the Commission is a petition for reconsideration ("Petition II") filed by Goodale on March 23, 1992 and responsive pleadings.[1]

2. Goodale filed an application for a new FM station in Lenoir, North Carolina on June 15, 1989. However, staff engineering review revealed that his application contained a discrepancy between the geographic coordinates specified in Section V-B of the application and those plotted on the transmitter site map.[2] Accordingly, the Goodale application was dismissed by the Mass Media Bureau ("Bureau"), acting pursuant to delegated authority, in the Hearing Designation Order designating for hearing eight remaining mutually exclusive applicants for the Lenoir facility. *Sundown Communications*, 5 FCC Rcd 7079 (M.M. Bur. 1990). On December 31, 1990, Goodale filed a petition for reconsideration of this dismissal. Pursuant to 47 C.F.R. § 1.104(b), we treated Goodale's Petition I as an application for review of the Bureau's action dismissing the application, and denied review.

3. Because Petition II seeks reconsideration of our action denying review, it is governed by the procedures set forth in 47 C.F.R. §§ 1.106(b)(2) & (3). Section 1.106(b)(3) states:

> A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.

To the extent that Goodale's petition continues to argue that the staff could confidently and reliably, drawing on the application as a whole, determine the proposed location of his transmitter site, it is repetitious. Accordingly, having previously addressed this argument, we shall not debate its merit herein. Goodale's repetitious arguments provide no basis for granting reconsideration. *See WWIZ, Inc.*, 37 FCC 685, 686 para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

4. Additionally, 47 C.F.R. § 1.106(b)(2) states, in pertinent part:

> Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;

Goodale contends that reconsideration is warranted and his application should be reinstated because of three events that have occurred subsequent to the filing of Petition I. Specifically, Goodale contends that, having recognized the harsh consequences befalling broadcast applicants resulting from the "hard look" processing rules, the Commission has proposed their elimination. Secondly, Goodale calls attention to the *Initial Decision* of the presiding Administrative Law Judge in MM Docket No. 90-430, 7 FCC Rcd 1861 (1992), which disqualified the three remaining applicants for the Lenoir facility. Goodale asserts that he remains the only fully qualified applicant for the proposed FM station in Lenoir. Finally, Goodale contends that reinstatement of his application would be consistent with Commission action taken in *Special Markets Media*, 4 FCC Rcd 5753 (1989).

5. We believe that the arguments raised by Goodale's Petition II are without merit and we will deny the petition for the reasons set forth below. First, although we recently modified the hard look approach in the *Report and Order* in MM Docket No. 91-347, 7FCC Rcd 5074 (1992), we declined to apply the modified "hard look" rules to applications already on file, such as Goodale's. *Id.* at 5079. Accordingly, reinstatement of Goodale's dismissed application based on the subsequent modification of the "hard look" rules is not warranted.

6. Next, Goodale's Petition II relies on the February 28, 1992 *Initial Decision* issued by the presiding Administrative Law Judge in the Lenoir hearing as justification for reinstating his dismissed application. In the *Initial Decision*, the presiding Administrative Law Judge disqualified the three remaining applicants for the proposed Lenoir facility. Consequently, Goodale argues, he remains the only fully qualified candidate and should now be afforded the opportunity to participate in this proceeding. However, the post-designation dismissal of the other Lenoir applicants is un-

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[1] On April 7, 1992, oppositions to Petition II were filed by Maria M. Ochoa and Foothills Broadcasting Inc., two of the mutually exclusive applicants for Channel 277A at Lenoir, North Carolina.

[2] Goodale specified coordinates of 35°58'40" N.L., 81°34'27" W.L. in Section V-B of his application, whereas the plotted coordinates on the site map were 35°58'40" N.L., 81°34'42" W.L. This discrepancy shows noncompliance with Appendix D, paragraph 4 of the Commission's FM "Hard Look" rules. *Report and Order*, MM Docket No. 84-750, 50 Fed. Reg. 19936, 19945 (1985), *reprinted at* 58 R.R. 2d 776 (1985). Under the "hard look" approach, applications not substantially complete at tender are returned to the applicant and lose their filing status. *Id.* at 19940, para. 23.

related to the acceptability of Goodale's application and, accordingly, their subsequent disqualification and dismissal does not warrant the relief that the petitioner seeks. Pursuant to the procedures established in *First Come/First Serve FM Broadcasting Application Processing System Clarification*, 51 Fed. Reg. 2374 (1986), an application filing window will be opened for the Lenoir channel allotment, affording Goodale an opportunity to resubmit his application, if no construction permit is awarded in the current proceeding. The requested relief would be inconsistent with our rules in that it would foreclose the opening of a new filing window.[3]

7. Finally, Goodale contends that the Commission has previously reopened proceedings to permit participation by applicants whose applications have been improperly dismissed. Goodale cites *Special Markets Media, supra*, for this proposition, and argues that it would be appropriate to follow the same procedure in the instant case. *Special Markets Media* was decided in 1989 and thus is not a "fact or circumstance" that has changed since Goodale's last opportunity to present such matters to the Commission. Thus, Goodale is barred from raising this contention. In any event, the *Special Markets* case is inapposite because, unlike the applicants in that case, who had not been provided adequate notice that they must protect the "buffer zones" of FM Class C stations, prior to the time he filed his application Goodale had been provided notice in six Commission decisions that his application must specify the same coordinates in Section V-B as shown on the submitted transmitter site map in order to be deemed acceptable for filing. *See e.g. Nan E. Carlisle & Jittendra R. Patel*, 3 FCC Rcd 2530 (1988); *Richard P. Bott, II*, 3 FCC Rcd 6063 (1988); *Steven B. Courts*, 4 FCC Rcd 4764 (1989). Thus, the *Special Markets* case is distinguishable and affords no basis for reversing the prior decision in this proceeding.

8. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by R. Donnie Goodale on March 23, 1992 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] The record in MM Docket No. 90-430 indicates that exceptions to the Administrative Law Judge's *Initial Decision* were filed on April 8, 1992 by the three remaining parties, Foothills Broadcasting, Inc.; Gateway Media Limited Partnership; and Marie M. Ochoa. Additionally, on April 27, 1992, Foothills Broadcasting, Inc. filed a request for an oral argument before the Review Board. These filings stay the effectiveness of the *Initial Decision* pursuant to the provisions of 47 C.F.R. § 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
CICI, INC.
GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED
IT&E OVERSEAS, INC.
MCI INTERNATIONAL, INC.
SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
TRT/FTC COMMUNICATIONS, INC.

File No. S-C-L-92-005

Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable Network Between and Among the United States Mainland, the State of Hawaii, the Island of Guam and Japan

CABLE LANDING LICENSE

Adopted: November 12, 1992; Released: November 25, 1992

By the Chief, Common Carrier Bureau:

1. On June 4, 1992, seven United States international service carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned Joint Application requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, to land and operate a high capacity digital submarine cable network known as the TPC-5 Cable Network (TPC-5), extending between and among the United States Mainland, the State of Hawaii, the Island of Guam, and Japan.

2. The Joint Application was placed on public notice on June 10, 1992. STC Submarine Systems Inc. (STC) filed comments requesting the Commission to condition the cable landing license and the accompanying Section 214 authorization.[2] The Joint Applicants[3] filed a Reply to which STC subsequently responded. For the reasons discussed below, we grant this application.

The TPC-5 Cable Network

3. TPC-5 will land at Coos Bay, Oregon (U.S.), San Luis Obispo, California (U.S.), Keawaula, Hawaii (U.S.), Tumon Bay, Guam (U.S.), and extend to Miyazaki and Ninomiya, Japan. The proposed cable network consists of twelve segments.[4]

4. TPC-5 will employ the latest SL2000 technology operating at 4.8 Gigabits per second (Gbit/s) on each of the two fiber pairs. One fiber pair will be used for service while the other will be used for restoration. The "loop" configuration of TPC-5, along with the fully redundant restoration pair, provides 100 percent fiber-on-fiber restoration and route diversity within the network, resulting in a much higher circuit reliability. The operating capacity of 4.8 Gbit/s for each pair, service and restoration, consists of 32 Basic System Modules (BSM) operating at 155 Megabits per second (Mbit/s), with each BSM consisting of 63 Minimum Investment Units (MIUs).[5] The design capacity per fiber pair is 2,016 MIUs. For voice services, digital circuit multiplication equipment (DCME) can be employed to derive about 150 virtual voice paths from each MIU.

5. The proposed cable network will be owned by the Joint Applicants and 37 foreign telecommunications administrations and entities in the following locations: Argentina, Australia, Austria, Belgium, Canada, China, Denmark, Finland, France, Germany, Hong Kong, Ireland, Indonesia, Italy, Japan, Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Peru, Philippines, Portugal, Singapore, Sweden, Switzerland, Taiwan, Turkey and the United Kingdom.

6. Although expressly supporting the construction of TPC-5, STC requests the Commission to condition approval of the cable landing license and accompanying Section 214 authorization by requiring the Joint Applicants to use a fair and open procurement process in awarding the construction contracts for TPC-5 as it did in *Pacific Telecom Cable*.[6] As we decided in TPC-4, given competitive market circumstances, we can find no public interest benefit to involving the Commission in the management of the TPC-

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), CICI, Inc., d/b/a IDB International (IDB), GTE Hawaiian Telephone Company, Inc. (HTC), IT&E Overseas, Inc. (IT&E), MCI International, Inc. (MCII), Sprint Communications Company Limited Partnership (Sprint), and TRT/FTC Communications, Inc. (TRT/FTC).

[2] *See* File No. ITC-92-179.

[3] Sprint and MCII did not join in this reply.

[4] Segments A, B, C, D, E, and F, are, respectively, the new cable station at Coos Bay, Oregon; the cable station at San Luis Obispo; the cable station at Keawaula, Hawaii; the cable station at Tumon Bay, Guam; the cable station at Miyazaki, Japan and the cable station at Ninomiya, Japan. Segment G is the whole of the submarine cable network linking Segments B and C. Segment H is the whole of the submarine cable network linking Segments C and D. Segment I is the whole of the submarine cable network linking Segments D and E. Segment J is the whole of the submarine cable network linking Segments F and A. Segment T1 is the whole of the submarine cable network linking Segments A and B. Segment T2 is the whole of the submarine cable network linking Segments E and F.

[5] A MIU is a 2.048 Mbit/s digital stream jointly assigned between two partners or wholly assigned to a party which is used for purposes of ownership allocation.

[6] *Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686 (1987) (Conditional license); 4 FCC Rcd 8061 (1989) (Final license).

5 procurement decisions and do not believe that it is necessary to condition the grant of TPC-5 on assurances of competitive procurement practices.[7]

7. Pursuant to our obligations under 47 U.S.C. §§34-39, the Department of State, after having coordinated with the National Telecommunications and Information Administration and the Defense Information Systems Agency, has approved the landing of TPC-5 in the United States.[8]

8. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[9] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

9. Concurrent with consideration of this application, this Commission has granted the Joint Applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate TPC-5 (DA 92-1559, adopted November 12, 1992, File No. I-T-C-92-179). As detailed in the companion Section 214 authorization of TPC-5, we find that the proposed TPC-5 Cable Network is in the public interest, and we find that this application requesting a cable landing license should be granted.

Ordering Clauses

10. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United Sates," 47 U.S.C. §§34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprint in* 3 U.S.C.A. §301 at 1052 (1985), to the Joint Applicants (AT&T, IDB, HTC, IT&E, MCII, Sprint and TRT/FTC) a license to land and operate one high capacity digital submarine cable, having a capacity of 4.8 Gbit/s per fiber pair, extending between Coos Bay, Oregon (U.S.), San Luis Obispo, California (U.S), Keawaula, Hawaii (U.S.), Tumon Bay, Guam (U.S.), Miyazaki, Japan and Ninomiya, Japan. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (5) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (6) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of the United States' Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies directly or indirectly controlling them or controlled by them or under direct or indirect common control with any of them shall not acquire or enjoy any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing And Operation of Submarine Cables of the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

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[7] *See American Telephone & Telegraph, et. al.*, 4 FCC Rcd 8046 at 8 (1989) (*TPC-4 Decision*). *See also* TPC-5 Section 214 authorization, para. 22 and 23, DA 92-1559, adopted November 12, 1992.

[8] Letter from Michael T.N. Fitch, Senior Deputy U.S. Coordinator and Director for the Bureau of International Communications and Information Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (October 20, 1992).

[9] *See* Section 214 Application, File No. I-T-C-92-179, at p. 23.

11. IT IS FURTHER ORDERED that STC's request to condition the TPC-5 cable landing license is hereby denied.

12. This order is issued under Section 0.291 of the Rules and is effective upon adoption. Petitions for consideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of public notice of this order (*see* Section 1.14(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LMC SATCOM, INC. File No. I-T-C-92-246

Application for authority
pursuant to Section 214 of the
Communications Act of 1934,
as amended, to operate channels
of communications via the
Galaxy V satellite between
the U.S. and Canada

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ORDER AND AUTHORIZATION

Adopted: November 10, 1992; Released: November 25, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by LMC Satcom, Inc. (LMC) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-246 IS GRANTED and LMC is authorized to:

(a) establish channels of communication between appropriately licensed earth stations in the U.S. and cable television and other subscribers in Canada via the Galaxy V domestic satellite; and

(b) lease said facilities to common carriers and other entities for the provision of video and data transmission services between the U.S. and Canada.

3. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized by this order.

4. This order constitutes the final step with respect to the provision of transborder services insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

5. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

6. This authorization is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-92-243

Application for authority to acquire and operate facilities for service between the U.S. and Tonga.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 12, 1992; Released: November 25, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Tonga by MCI Telecommunications Corporation (MCI).[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-243 IS GRANTED and MCI is authorized to:

a. lease from Comsat and operate 10 voice-grade satellite circuits between the Yacolt, Washington earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Tonga furnished by MCI's correspondent in Tonga;

b. own and operate 10 voice-grade circuits in the Yacolt earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate 10 voice-grade connecting circuits between the Yacolt earth station and MCI's Dominguez Hills, California operating center; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and Tonga.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and Tonga -- that is, private lines which originate in the United States and terminate in Tonga or which originate in Tonga and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Tonga end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Tonga affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreement between MCI and its correspondent in Tonga, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

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[1] In its application MCI requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Tonga and points beyond. We note that should MCI obtain any interest in facilities beyond Tonga for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CTN-CUSTOM TELECOMMUNICATIONS NETWORK OF ARIZONA, INC. — File No. I-T-C-92-239

Application for authority to operate as an international resale carrier.

SOURIS RIVER TELECOMMUNICATIONS CO. d/b/a SRT LONG DISTANCE — File No. I-T-C-92-240

Application for authority to operate as an international resale carrier.

EXPRESS COMMUNICATIONS, INC. — File No. I-T-C-92-241

Application for authority to operate as an international resale carrier.

NATIONAL TELE-SAV, INC. — File No. I-T-C-92-251

Application for authority to operate as an international resale carrier.

UNITED TELEPHONE TECHNOLOGIES, INC. — File No. I-T-C-92-256

Application for authority to operate as an international resale carrier.

CARIBBEAN TELEPHONE & TELEGRAPH CO. d/b/a CT&T — File No. I-T-C-92-257

Application for authority to operate as an international resale carrier.

LONG DISTANCE NETWORK OPERATOR SERVICES, INC. d/b/a LDNOSI — File No. I-T-C-92-258

Application for authority to operate as an international resale carrier.

AMERICAN LONG DISTANCE SERVICES, INC. — File No. I-T-C-92-259

Application for authority to operate as an international resale carrier.

VALUE-ADDED COMMUNICATIONS, INC. — File No. I-T-C-92-261

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 12, 1992; Released: November 25, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by CTN-Custom Telecommunications Network of Arizona, Inc. (CTN), Souris River Telecommunications Co. d/b/a SRT Long Distance (SRT), Express Communications, Inc. (ECI), National Tele-Sav, Inc. (NTI), United Telephone Technologies, Inc. (UTT), Caribbean Telephone & Telegraph Co. d/b/a CT&T, Long Distance Network Operator Services, Inc. d/b/a LDNOSI (LDNOSI), American Long Distance Services, Inc. (ALDS) and Value-Added Communications, Inc. (VAC).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-239, I-T-C-92-240, I-T-C-92-241, I-T-C-92-251, I-T-C-92-256, I-T-C-92-257, I-T-C-92-258, I-T-C-92-259 and I-T-C-92-261 ARE GRANTED, and

a. CTN is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, TRT/FTC's Tariff F.C.C. No. 15, C&W's Tariff F.C.C. No. 3, Litel's Tariff F.C.C. No. 1, Midatlantic Telecom's Tariff F.C.C. No. 1, LDDS's Tariff F.C.C. No. 1 and Wiltel's Tariff F.C.C. No. 2 between the U.S. and the international points listed in those tariffs;

b. SRT is authorized to provide international switched voice service by the resale of the international switched voice service set forth in LDDS's Tariff F.C.C. No. 1 between the U.S. and the international points listed in that tariff;

c. ECI and UTT are authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs;

d. NTI is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2 and TeleDial America's Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariffs;

e. CT&T is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariff F.C.C. No. 1, Allnet's Tariff F.C.C. No. 1 and Wiltel's Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariffs; and

f. LDNOSI, ALDS and VAC are authorized to provide international switched voice service by the resale of the international switched voice service set forth in Advanced Telecommunications Corp.'s Tariff F.C.C. No. 2, AT&T's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, Litel's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, Metromedia's Tariff F.C.C. No. 2, Sprint's Tariffs F.C.C. Nos. 1 and 2, and Wiltel's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-380

In re Applications of

RIO GRANDE BROADCASTING CO.	File No. BPH-880815MV
ROBERTO PASSALACQUA	File No. BPH-880816NN
IRENE RODRIGUEZ DIAZ DE McCOMAS	File No. BPH-880816OR
UNITED BROADCASTERS COMPANY	File No. BPH-880816OW

For Construction Permit for a
New FM Station on Channel 247A
in Rio Grande, Puerto Rico

Appearances

Timothy K. Brady on behalf of Rio Grande Broadcasting Company; *Roy F. Perkins, Jr.* on behalf of Roberto Passalacqua; *Jerome S. Boros* and *Jerold L. Jacobs* on behalf of Irene Rodriguez Diaz De McComas; *John L. Tierney* on behalf of United Broadcasters Company; and *James W. Shook* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: November 18, 1992; Released: November 27, 1992

1. This proceeding involves the mutually exclusive applications of Rio Grande Broadcasting Co. (RGB), Roberto Passalacqua (Passalacqua), Irene Rodriguez Diaz de McComas (McComas), and United Broadcasters Company (United) for a construction permit for a new FM broadcast station to operate on FM Channel No. 247A at Rio Grande, Puerto Rio.[1] The applications were designated for hearing by *Hearing Designation Order* (H.D.O.), DA 90-1078, released September 6, 1990, which specified the following issues:

> (1) If a final environmental impact statement is issued with respect to United in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
>
> (2) To determine with respect to RGB whether the applicant is financially qualified.
>
> (3) To determine whether there is a reasonable possibility that the tower heights and locations proposed by Fuerte, RGB, and Passalacqua would constitute hazards to air navigation.
>
> (4) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (5) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. The H.D.O. also required that the areas and populations to be served by the applicants, as well as the availability of other aural services within these areas, be considered under the standard comparative issue.

3. Issue No. 1 above was deleted by *Order*, released February 11, 1991 (FCC 91M-517), and Issue No. 2 by *Memorandum Opinion and Order*, released February 11, 1991 (FCC 91M-525). Summary Decision in Passalacqua's favor of Issue No. 3 was granted by *Order*, released July 24, 1991 (FCC 91M-2254). Accordingly, the sole issues remaining for disposition below are those issues set forth in 4 and 5 above.

4. Prehearing conferences were held on November 13, 1990, and August 8, 1991. Hearing sessions were held at the Commission's offices in Washington, D.C. on December 3 through 6 and December 9 and 10, 1991, at the conclusion of which the record was closed.

Preliminary Matters

5. United filed a motion to strike on April 9, 1992, a portion of RGB's reply statement dated March 19, 1992, to the proposed findings of fact and conclusions of law filed in this proceeding. Specifically, it asks that an attachment thereto, identified as United Exhibit 5, be stricken. It states that the document is not the document identified and received into evidence as United Exhibit 5, and it should, therefore, be stricken.

6. The Presiding Judge finds good cause for granting the motion, and the attachment identified above will be stricken. United's request that it be granted leave to file a reply to RGB's opposition statement to its April 9, 1992 motion to strike will be denied for failure to show good cause.

7. RGB filed a motion to strike a portion of United's Exhibit 5 which was received into evidence during the hearing session on December 9, 1991, on the basis that it was not part of United's Exhibit 5 which was exchanged on the exhibit exchange date established in this proceeding, and that the material contained therein was not set forth in United's Integration and Diversification Statement filed on December 4, 1990. The matter which RGB seeks to have stricken concerns Ms. Gonzalez' position as Secretary of

[1] The applications of Iglesia Bautista Castillo Fuerte and Rio Grande Broadcasting Corporation, Inc. were dismissed with prejudice by *Order*, released January 31, 1991 (FCC 91M-359) and *Order*, released November 15, 1990, respectively.

United Editors, Inc., publisher of "Artistas", a bi-weekly entertainment magazine, and her intention to resign this office in the event that United is the successful applicant.

8. On November 4, 1991, United exchanged a "corrected" version of United Exhibit 5, in which it disclosed Ms. Gonzalez' corporate office and her proposal to resign this position, as well as a statement from Ms. Gonzalez to the effect that this information was inadvertently omitted from United Exhibit 5 exchanged on November 1, 1991. Opposing parties were, therefore, put on notice of these changes, and it was up to RGB to raise any objections to the receipt of the exhibit at the hearing session. It chose not to do so. A grant of its motion, at this time, even if one assumes that it has merit, would not only be disruptive of this proceeding, but would encourage parties in the future to be less than vigilant, relying instead on a post-hearing motion to strike. In the interests of orderly administrative procedure, and in the absence of a proper justification for reconsideration of the *Order* receiving the exhibit in question, the motion will be denied.

9. It is noted, in conclusion, that the "media interest", even if it were charged to United, would have little or no decisional significance. Ms. Gonzalez had no ownership interest in United Editors, Inc., which, parenthetically, was sold on December 31, 1991, and she did not have any duties in connection with its day-to-day operations. The magazine, itself, "Artistas" was not the type of periodical which is of concern under the diversification criterion. Therefore, receipt into evidence of Ms. Gonzalez' decision to resign from this position would, in any case, not constitute a comparative upgrade.

RIO GRANDE BROADCASTING CO.

Findings of Fact

10. RGB is a partnership organized under the laws of the Commonwealth of Puerto Rico, consisting of three partners with the following percentages of ownership: Noe Marin, 51.0 percent; Vilma Iris Arroyo, 24.5 percent; and Jorge Figueroa, 24.5 percent (RGB, Ex. #1).

Diversification

11. Neither RGB, nor any of its partners, has any attributable interest in any medium of mass communications (RGB, Ex. #1).

Best Practicable Service

Noe Marin

12. Mr. Marin proposes to serve as Sales Manager at the proposed station, working a minimum of 40 hours a week. As such, he will be responsible for the development and implementation of the station's sales and advertising policies, and he will supervise the sales staff, which will consist, initially, of only one employee (Tr. 56-57).

13. Mr. Marin was born in Puerto Rico, and he has lived in Rio Grande, Puerto Rico since 1975. Prior to that time, he lived in Canovanas, Puerto Rico. All of Mr. Marin's residences have been located within the 3.16 mV/m, principal city coverage contour of RGB's proposed station. In the event that his application is granted, he will continue to reside in Rio Grande, Puerto Rico (RGB, Ex. #2, para. 2). Mr. Marin has been a member of the Universal Church of Jesus Christ for the last 15 years. He has also served on its Board of Deacons for the past five years, and as deacon, he has been involved in the administration of the Church's affairs. During the past ten years, Mr. Marin has participated in three to four seminars annually in Rio Grande, Puerto Rico, for the purpose of educating young people as to the perils of drug abuse, and he has also visited, on a regular basis, hospitalized patients in Rio Grande. Mr. Marin estimates that the above activities normally occupy 20 hours a week of his time, and he indicates that he will continue to participate in these activities in the event that RGB is the successful applicant. He maintains, however, that he will not assume any civic commitments which would conflict with his duties at RGB's proposed station (Tr. 152-53).

Vilma Iris Arroyo

14. Ms. Arroyo will serve as the station's full-time General Manager, working a minimum of 40 hours a week. As General Manager, she will supervise all aspects of the station's operations, and with her will rest ultimate responsibility for assuring that all employees perform their duties in a satisfactory fashion. Ms. Arroyo will also assume the duties of Program Director at the station (RGB, Ex. #3, para. 1).

15. Ms. Arroyo was born in Puerto Rico, and currently resides in Caguas, Puerto Rico. Since 1946, she has lived at residences located in Caguas, Rio Pedras, and Catano, Puerto Rico, all of which fall within the 3.16 mV/m contour of RGB's proposed station. In the event that RGB receives the permit for the Rio Grande broadcast facility, Ms. Arroyo will move to Rio Grande, Puerto Rico (RGB, Ex. #3, para. 2). For the past 15 years, Ms. Arroyo has been member of the San Jose Catholic Church, and in 1988, she participated in fundraising for a civic center for the parish and school. In addition, since 1987, she has been a member of the San Jose High School Parent's Council, as well as a member, since 1984, of the Altos de la Fuente Resident's Association, serving on its Board of Directors and as its Secretary in 1987 and 1988. Ms. Arroyo is currently a member of the Board and Chairperson of the Association's By-Laws Committee (RGB, Ex. #3, para. 3).

Jorge Figueroa

16. Mr. Figueroa proposes to be the station's full-time Business Manager, working a minimum of 40 hours a week. As Business Manager, he will be responsible for the development as well as the implementation of the financial policies of the station. He will also supervise all aspects of the station's business and financial affairs, including traffic, billing, bookkeeping, and purchasing. In addition, Mr. Figueroa will oversee the station's technical operations, and supervise a full-time receptionist/traffic person and two or more part-time employees in bookkeeping and clerical functions (RGB, Ex. #4, para. 1; Tr. 240).

17. Mr. Figueroa was born in Puerto Rico, and he has lived in Caguas, Puerto Rico, continuously since 1944, except for a period between 1970 and 1972 when he lived in Rio Pedras, Puerto Rico. All of his residences have been located within the 3.16 mV/m, contour of RGB's proposed station. In the event that RGB's application is granted, Mr. Figueroa will move to Rio Grande, Puerto Rico (RGB, Ex. #4, para. 4). Since 1987, Mr. Figueroa has been a member of the San Jose High School Parent's council, serving as its president from 1989 until May, 1991, and since that time as its vice president. In performing his duties, he oversees both the council and the school, and he participates in

activities benefiting the school. Since 1984, Mr. Figueroa has been a member of the Altos de la Fuente Resident's Association, serving as its first president. He has also provided free legal services for the Association, including preparing legal documents, and representing the Association at public hearings. In addition, Mr. Figueroa is a member of the Association's Recycling Committee and served as its representative to the city of Caguas with respect to the city's recycling program. For the past 15 years, he has been a member of the San Jose Catholic Church, and participated in two annual conferences sponsored by the Church, and organized and participated in fundraising for the parish (Tr. 262-63). Since 1987, Mr. Figueroa has been a member of the Caguas chapter of the Full Gospel Businessmen's Association, serving as its Secretary in 1989-90, and as its Vice-President continuously since 1990. During the past three years, he assisted with the Association's Thanksgiving Day Dinner for Hogar Crea, a drug rehabilitation center in Caguas (RGB, Ex. #4, para. 6).

Auxiliary Power

18. RGB will install an auxiliary power source at both its studio and transmitter sites in order to insure continuity of service in the event of a power failure (RGB, Ex. #1, para. 3).

Conclusions of Law

Diversification

19. RGB is not subject to a diversification demerit of any degree.

Best Practicable Service

20. There is no evidence of record which calls into question the commitment of the three general partners of RGB to the enterprise, or their willingness and ability to assume their proposed duties on a full-time, not less than 40 hours a week, basis. Mr. Marin, although he relied earlier on the advice of an uncle, has, as principal shareholder, been the moving force behind the application. Mr. Marin chose not to serve as General Manager, preferring instead to act as Sales Director; a choice which appears understandable in light of his past sales experience, as well as the background of the other two general partners.

21. Ms. Arroyo, as General Manager, will have ultimate responsibility for the supervision of all of the station's employees, including the principal shareholder, Mr. Marin. Although as majority shareholder, Mr. Marin will have the authority to fire Ms. Arroyo (Tr. 92-95), thereby, in effect, overriding any decision she might make, Ms. Arroyo intends, nevertheless, to be in charge of all of the station's personnel, including Mr. Marin and Mr. Fegueroa (Tr. 135-36, 196, 199-201, 206). She indicated that she was selected for the position because of her prior management experience, especially as it relates to the supervision of personnel; and that it was felt by all of RGB's general partners that Mr. Marin, with his experience in sales, was better suited to be sales manager (Tr. 54, 94-95, 135-36, 193-95, 197). There is no basis, nor any precedent for refusing to credit Ms. Arroyo's integration commitment as General Manager based solely on the fact that she does not hold a majority equity interest in the applicant. There is no evidence of record which disputes Ms. Arroyo's claim that she will function as General Manager; that she, along with the other general partners, will establish station policy; and that as General Manager, she will directly supervise the station's programming staff, its Sales Manager, and its Business Manager (RGB, Ex. #3; Tr. 135-36, 199-200). Accordingly, the Presiding Judge finds that RGB is entitled to a 24.5 percent quantitative integration credit for its proposal to integrate, on a full-time basis, Ms. Arroyo into the affairs of the proposed station as General Manager. The credit is qualitatively enhanced by her position as an Hispanic, with local residence since 1960, with some civic involvement.

22. Mr. Marin, as noted above, proposes to serve as the station's Sales Manager. In addition, he, along with the other General Partners, will oversee the continuing ascertainment of community needs and interests and help formulate station policy, while assuring the station's compliance with the Commission's rules and regulations (RGB, Ex. #2, p. 1; RGB, Ex. #3, p. 1; RGB, Ex. #4, p. 1). According to his unrefuted testimony, Mr. Marin made the decision to serve as the station's Sales Manager prior to the filing of RGB's integration statement (Tr. 177-78); and that his decision to terminate his present employment and work full-time at the station was made at the time RGB's application was sent to the Commission (Tr. 84-85). Mr. Marin testified that he intends to spend 20 hours a week on sales at the station, and 20 hours a week on supervising the sales staff. He has also committed himself to spending 40 hours a week on ascertaining the community's needs. Although it might appear, initially, that these figures are inconsistent, there is nothing to preclude Mr. Marin from undertaking his continuing ascertainment efforts, while pursuing his duties as Sales Manager. The record, therefore, does not contain any inconsistencies which would call into question either his intention to be integrated into a management position at the station for in excess of 40 hours a week, or his ability to carry out this commitment. Accordingly, RGB is entitled to an additional 51.0 percent quantitative integration credit for Mr. Marin's proposed service to the station. This integration credit is qualitatively enhanced by Mr. Marin's status as an Hispanic, and his long term residence within the service area of RGB's proposed station, with some civic involvement.

23. Finally, RGB seeks an additional 24.5 percent quantitative integration credit for its proposal to integrate Mr. Figueroa as the station's Business Manager. Mr. Figueroa presently devotes 10 to 20 hours a week to two dry cleaning establishments which he owns. He testified that he visits both businesses daily, once in the morning and then again in the afternoon. During these visits, he confers with his operators, collects receipts and then makes bank deposits. In addition, he works a shift at one of these establishments for between five and six hours every Saturday (RGB, Ex. #4, p. 3; Tr. 250-52). Mr. Figueroa indicated that in the event that RGB's application is granted, he will either sell his laundries, or eliminate his day-to-day involvement in these businesses by hiring an employee to assume complete responsibility for the shift he currently works on Saturday, and intrust to one of his current employees his day-to-day oversight activities, including collecting receipts and making bank deposits. Mr. Figueroa testified that he has competent employees at each establishment that he can trust with handling these responsibilities (RGB, Ex. #4, p. 3; Tr. 249-50). If necessary, he indicated further that he is prepared to hire such part-time help as may be necessary to assure the smooth operation of these businesses. Mr. Figueroa does not anticipate spending more than two hours a week on Saturdays in consultation with his managers and

in reviewing reports with respect to these businesses (RGB, Ex. #4, pp. 3-4; Tr. 287-88). However, in the event that these changes prove not to be successful and the businesses suffer, then he has stated they will be sold (RGB, Ex. #4, para. 3; Tr. 249-50, 253-54).

24. Mr. Figueroa also conducts a part-time law practice, spending approximately 20 hours a week on the practice of law. He would, however, limit the number of hours spent to 10, as well as restrict his practice to civil matters which do not involve litigation or court appearances in order to meet his integration commitment to RGB (RGB, Ex. #4, p. 2; Tr. 242). He proposes to devote Wednesday afternoons and Saturdays to his law practice (Tr. 288).

25. The Presiding Judge finds that Mr. Figueroa has set forth a specific and credible plan for reducing the number of hours he currently devotes to his dry cleaning businesses and his law practice in order to meet his integration commitment to RGB's proposed station. The ten hours that he will devote to the practice of law and the two hours he will spend on the laundry business, when added to the amount of time he will devote to the radio station, does not appear to present an impossible burden.

26. Accordingly, the Presiding Judge finds that all three integration proposals are credible, and that RGB is entitled to a 100 percent quantitative integration credit, qualitatively enhanced by the fact that all three principals are Hispanics, and Mr. Marin's long-term residence in Rio Grande, Puerto Rico, and Ms. Arroyo and Mr. Figueroa long-term residence within the proposed service area, and their commitment to move to Rio Grande, Puerto Rico in the event that RGB is the successful applicant. Each person has been involved to some degree in the civic activities of their community, warranting additional qualitative enhancement. The application, itself, is entitled to further enhancement for RGB's proposal to install an auxiliary power source at its studio and transmitter sites.

ROBERTO PASSALACQUA

Findings of Fact

27. Mr. Passalacqua is an individual applicant (Passalacqua, Ex. 1, p. 1).

Diversification

28. Mr. Passalacqua has no interest in or association with any medium of mass communications (Passalacqua, Ex. #1, p. 1).

Best Practicable Service

Roberto Passalacqua

29. Mr. Passalacqua will serve as the station's General Manager, working a minimum of 40 hours a week. As General Manager, he will be in charge of all aspects of the station's management and operations, including supervising the sales and programming staff (Tr. 309).

30. Mr. Passalacqua was born at Orocovis, Puerto Rico, and he has resided within the 1 mV/m or better coverage contour of his proposed station continuously since 1970 (Passalacqua, Ex. #1, p. 2). He has been a member of the following civic organizations: Popular Party, 1972 to the present, acting as master of ceremonies, and assisting in fundraising and counseling the party on legal questions; Legal Aid to the Poor, San Juan, 1982 to the present, serving as volunteer once or twice a month for this program which provides free legal services to the poor; the Small Business Retailers Association, 1986 to the present; the Puerto Rico Farm Association, Santurce, Puerto Rico, 1988 to the present, for which he helped organize public seminars several times a year dealing with animal diseases and remedies (Tr. 356-57). In addition, Mr. Passalacqua has, since 1970, served as master of ceremonies and has recorded announcements for airing on radio and television for Hogares Crea, an anti-drug abuse program. He has also been providing free legal services, since the fall of 1990, to the poor at the United Methodist Church, San Juan, Puerto Rico (Passalacqua, Ex. #1, p. 3).

31. From 1966 to the present, Mr. Passalacqua has worked as an announcer, news reporter, writer, producer, and program host at radio and television stations in Puerto Rico, including the San Juan area (Passalacqua, Ex. #1, pp. 3-4).

Auxiliary Power

32. Mr. Passalacqua will install an auxiliary power source at his studio and transmitter locations to insure continuous service in the event of a power failure (RGB, Ex. #1, p. 4).

Conclusions of Law

Diversification

33. Mr. Passalacqua's application is not subject to a diversification demerit of any degree.

Best Practicable Service

34. As noted above, Mr. Passalacqua proposes to devote 40 hours or more a week to his duties as General Manager of his proposed station in Rio Grande, Puerto Rico. Although he is the owner of a travel agency in San Juan, Puerto Rico, the Colonial Travel Agency, it is operated by a paid manager, and it requires no more than one to two hours a week of Mr. Passalacqua's time (Passalacqua, Ex. #1). He also indicated, at the hearing, that he will terminate his law practice as well as his present employment in the event that his application is granted (Passalacqua, Ex. #1). It does not appear, therefore, that Mr. Passalacqua has any future commitments which will interfere with his proposal to devote 40 hours or more a week to his duties at the station. The Presiding Judge concludes, therefore, that Mr. Passalacqua is entitled to a 100 percent quantitative integration credit for his proposal to serve as General Manager at his proposed station. This quantitative integration credit is qualitatively enhanced by his status as an Hispanic, and his long-term residence within the service area of his proposed station with some civic involvement. Mr. Passalacqua has held a management position at a broadcast facility (Passalacqua, Ex. #1; Tr. 308, 348-49), and he has been a host and producer at radio and television stations in Puerto Rico all of which, undoubtedly, has given him some familiarity with the operations of a broadcast facility. He is entitled, therefore, to a further, very slight enhancement credit for his past broadcast experience. The application itself is entitled to further comparative credit for its proposal to install an auxiliary power source to ensure continued operation in the event of a power failure.

IRENE RODRIGUEZ DIAZ DE MCCOMAS

Findings of Fact

35. Mrs. McComas is an individual applicant. In the event that her application is granted, she will operate the station at Rio Grande, Puerto Rico as a sole proprietorship (McComas, Ex. #1).

Diversification

36. Mrs. McComas has no interest in or association with any medium of mass communications. Her husband, John M. McComas, owns an eight percent interest in MCO Industries, Inc., whose first tier subsidiary, Cavallaro Broadcasting Corporation, is the licensee of Station WOSO(AM), San Juan, Puerto Rico. According to her testimony, Mr. McComas has agreed to divest himself of any interest or control over WOSO(AM), San Juan, Puerto Rico, and he will take whatever additional steps are necessary to achieve that goal (McComas, Ex. #4; Tr. 370, 377-78).

Best Practicable Service

37. Mrs. McComas will serve as her station's General Manager, and she will exercise general supervision and ultimate control over the station's operations, including policy formation, programming, format choice, sales, engineering, and business and personnel administration of the station (McComas, Ex. #2).

38. Mrs. McComas was born within her proposed station's service area and has lived within that area for about 28 years, except for intermittent periods of time spent at schools in the northeastern part of the United States and two and one half years in New York, N.Y. She has been a continuous resident of the proposed service area since 1978 (Tr. 535). Mrs. McComas has indicated that she will continue to reside within the proposed service area in the event that her application is granted (McComas, Ex. #3; Tr. 359-60). From 1978 to 1981, Mrs. McComas was employed by the Government of Puerto Rico. During that period of time, according to her testimony, she became familiar with the Rio Grande community and its problems. She cited as an example of such familiarity, her participation in the resolution of an interagency governmental dispute which had the effect of precluding ambulatory salespersons in the Rio Grande area from selling their wares on public highways. According to her testimony, she formulated a plan enabling these entrepreneurs to remain in business (McComas, Ex. #3; 524-27, 529-31). She also indicated that she has devoted between 100-200 hours a year to civic activities within the service area. As evidence of this involvement in civic affairs, Mrs. McComas references 25 hours a year volunteer work since 1990 for the Puerto Rico chapter of UNICEF, (McComas, Ex. #3); 8 to 11 hours a month developing catechism classes at her children's school, St. John's School in Candado, Puerto Rico and an additional eight hours a week at the school as a room mother and as a member of the Home Room Association. During part of the time devoted to the school, Mrs. McComas engaged in fundraising and in organizing various programs for the school (McComas, Ex. #3; Tr. 521-23). Mrs. McComas has also participated in the KID-CARE program, spending four hours a month on this activity, and she is currently involved as well in the formation of a foundation for a pediatric hospital in Rio Pedras, Puerto Rico, serving as a member of its executive committee. Mrs. McComas is also helping to formulate a platform for a political party in Puerto Rico (Tr. 521).

Auxiliary Power Source

39. Mrs. McComas will install auxiliary power generators at her station's studio and transmitter sites to provide an emergency power source in the event of a power failure (McComas, Ex. #5, p. 1).

Conclusions of Law

Diversification

40. Mrs. McComas' husband, John McComas, is President and a Director and owns an eight percent voting interest in MCO Industries, Inc. (MCO), a family owned business (McComas, Ex. #4; Tr. 396-97). Cavallero Broadcasting Company (Cavallero), the licensee of WOSO(AM), San Juan, Puerto Rico, is wholly owned subsidiary of MCO. Although Mr. McComas has never had any connection with the radio station (Tr. 393-94), he served as treasurer of Cavallero Broadcasting Corp. in 1983, 1987, and 1988 and assistant treasurer in 1985 (United, Ex. #6 and 7; Tr. 411, 413, 419). It is conceded that the 70 dBu contour of McComas' proposed station would encompass at least a portion of San Juan, Puerto Rico, assuring a significant degree of overlay between the proposed station and WOSO(AM) (Tr. 508).

41. Mrs. McComas testified that her husband has agreed to divest himself of any interest in or association with Cavallaro. However, he did not tell her how he was going to divest this property, and Mrs. McComas was not a party to any discussion with him or anyone else associated with MCO as to how this was going to be accomplished (Tr. 374-75). There is nothing in the record from John McComas indicating a willingness to do so, much less how this divestiture would be accomplished. Although Mrs. McComas advances a number of ways in her reply statement as to how this might be accomplished, Mr. McComas has not come forward with a proposal subject to the scrutiny of all opposing parties and this Commission. The Presiding Judge, concludes, therefore, that no weight can be given to Mrs. McComas' attempt to avoid a diversification demerit by making a divestiture pledge for her husband, and the McComas' application will be charged with Mrs. McComas' husband's interest in Cavallaro, the licensee of Station WOSO(AM), San Juan, Puerto Rico.

42. Mrs. McComas indicates a willingness to accept the imposition of a condition on any grant of authority which would require such a divestiture. However, absent a timely filed divestiture commitment, the acceptance of such a proposal would amount to an impermissible upgrade, since it would remove the McComas diversification demerit and would improve her comparative position with respect to her competitors.

Best Practicable Service

43. Mrs. McComas' father-in-law called her attention to the availability of the Rio Grande, Puerto Rico frequency, and suggested that she apply for it (Tr. 396-97, 400). He gave her some general advice and told her to contact a specific lawyer specializing in communications, who could supply her with additional information (Tr. 397-98, 400). Mrs. McComas contacted the attorney, who is her attorney

of record, and he, in turn, referred her to an engineering consultant (Tr. 401). Once she decided to go through with the application, the arrangements were made with the attorney of record to prepare the application (Tr. 509). Her father-in-law also referred her to a real estate agent with whom she had no prior acquaintance (Tr. 469, 482-83, 510). It was either her father-in-law or the real estate agent who contacted the owners of Mrs. McComas' two antenna sites (Tr. 514-15). Mrs. McComas did not have any contact with them. According to her testimony, Mr. McComas also assisted her in determining what it would cost to construct and operate the station (Tr. 483), and her husband, John McComas, delivered to her the engineering portion of her application which had been faxed to his office (Tr. 423, 426-27). He also established the public inspection file, and made certain that the required legal notices were published at the time the application was filed and after it was designated for hearing (Tr. 470-72, 474-75). While her husband has not contributed any funds to the enterprise, all funds used in furthering her application were drawn from a joint checking account that she maintains with her husband (Tr. 484-85). Although some of the services performed by her father-in-law and her husband in furthering Mrs. McComas' application occurred before it was filed, as noted above, her husband performed a number of other duties for his wife after the application was filed. They were, however, limited to the filing of the above referenced notices, and the establishment of the public inspection file (Tr. 470-72, 474-75).

44. When first contacted by the senior Mr. McComas about the availability of the Rio Grande, Puerto Rico facility, a short two months before the application was filed, Mrs. McComas admitted that she did not have any particular interest in entering the broadcasting field (Tr. 481). Mrs. McComas had no contact with the owners of the transmitter sites, and she was unable to say whether it was her father-in-law or the real estate agent who worked out the site availability arrangement with the owners of the sites (Tr. 514). In addition, she did not know the address of her public inspection file, and she has never spoken with the attorney who is the custodian of the public file (Tr. 472). It appears, therefore, that Mrs. McComas, throughout the application process, has played a relatively passive role. She did, however, consult with her attorney, assist in the preparation of the budget for the station, and, along with her attorney, prepared the application. Despite her rather cavalier attitude towards the application process, a case in point being her initial reluctance to submit herself to the taking of oral deposition, Mrs. McComas, the sole owner of the applicant, is an educated woman of independent means, who has held positions of responsibility in the past. The Presiding Judge is unable, therefore, to find, based on the evidence of record, that she will not assume the duties of General Manager at her wholly owned station in the event that Mrs. McComas is the successful applicant. Accordingly, he finds that the McComas application is entitled to a 100 percent quantitative integration credit, qualitatively enhanced by her status as an Hispanic, and her long-term residence within the proposed service area with some civic involvement.

45. The McComas application is entitled to a further comparative credit for her proposal to install an auxiliary power source at her studio and transmitter sites.

UNITED BROADCASTERS COMPANY

Findings of Fact

46. United is a Puerto Rican General Partnership composed of the following general partners: Luis A. Guzman Lluberes and Ana M. Velez Borras, husband and wife, who together hold a 50 percent general partnership interest as joint tenants; and Josantonio Mellado Romero and Carmen Gonzalez Vega, husband and wife, who also hold a 50 percent general partnership interest as joint tenants. Each couple owns 50 percent of the partnership shares, and each couple has one vote in the partnership, and will receive 50 percent of the profits and be responsible for 50 percent of the losses (United, Ex. #1 and 8, p. 3; Tr. 554, 556, 649, 650, 698).

Diversification

47. Mr. Guzman is President and 50 percent owner of A&L Productions, Inc., a producer of television programs and live entertainment shows in Puerto Rico. In the event that United is the successful applicant, he will divest himself of all of his interests in and connection with this company. Mr. Guzman has no other media interests or connections (United, Ex. #3, p. 2). Ms. Velez has no ownership interests in or connections with any medium of mass communications (United, Ex. #2, p. 3). Mr. Mellado is the President, Secretary and treasurer, as well as a Director and 90 percent owner of United Editors, Inc., the publisher, as of the date of the hearing, of "Artistas", a bi-monthly show business magazine. Mr. Mellado also served as editor of the periodical. His wife, Ms. Gonzalez, is Secretary of United Editors, Inc. (United, Ex. #4, p. 2; United, Ex. #5, p. 3). Mr. Mellado is also the President, a Director and 50 percent owner of Famma & Associates, Inc., a promoter of various types of entertainment performances and the manager of one entertainer. He has indicated that he will divest himself of all of his ownership interests, resign all of his offices, directorships and employment as well as sever all connections with United Editors, Inc., "Artistas" and Famma & Associates, Inc. in the event that United is the successful applicant for the Rio Grande facility (United, Ex. #4, pp. 2-3; United, Ex. #5, p. 3).

Best Practicable Service

Ana Maria Velez Borras

48. Ms. Velez will be the proposed station's full-time General Manager, devoting a minimum of 40 hours a week to her duties at the station. As General Manager, Ms. Velez will implement the station's policies on a day-to-day basis, and she will oversee all aspects of the station's operations, including programming, sales, business and regulatory matters, and the implementation of the station's Equal Employment Opportunity Program (United Ex. #2, p. 1).

49. Ms. Velez was born in San Juan, Puerto Rico, and has lived within the 1 mV/m contour of United's proposed station her entire life. In the event that United receives the permit, Ms. Velez will move to Rio Grande, Puerto Rico. From 1974 to 1977, Ms. Velez served as a Young Leader with the Girl Scouts. She was also a volunteer for the Puerto Rico Heart Association in 1990, and is presently an active member of the P.T.A. of Collegio Puertorriqueno de Ninas in Caparra, Puerto Rico (United, Ex. #2, p. 3).

Josantonio Mellado Romero

50. Mr. Mellado will devote a minimum 40 hours a week to his duties as Program Director at United's proposed station. He will also, as a General Partner, participate in formulating station policy, including that related to programming. As Program Director, he will be responsible for seeing that the station's programming policy is implemented, and he will also directly supervise the station's announcers (United, Ex. #4, p. 1).

51. Mr. Mellado has lived within the 1 mV/m contour of United's proposed station continuously since 1969. He is a native of Spain. In the event that United's application is granted, he will move to Rio Grande, Puerto Rico. From 1977 to 1982, Mr. Mellado was an active member of the Governor of Puerto Rico's Committee on Employment of the Handicapped, a subsidiary of the President of the United States' Committee on Employment of the Handicapped. In addition, he has given, since 1972, and continues to give speeches to student groups and social service institutions throughout Puerto Rico to encourage and motivate disadvantaged and handicapped persons (United, Ex. #4, p. 4). Mr. Mellado also served as Treasurer of the Board of Directors of his residential community from 1980 to 1981, and as President of the Board from 1981 to 1983. He is currently Vice-President (United, Ex. #4, p. 4). In August, 1990, Mr. Mellado was appointed to the Consulting Board of Puerto Rico's College of Arts (United, Ex. #4, p. 4). In addition, he has also produced and co-produced shows to raise funds for institutions such as the Pueblo del Nino de Rio Grande (1987), a home for homeless children in Rio Grande; the Puerto Rican Chapter of the American Cancer Society (1988); Proyecto Amor (1989), a home for children with AIDS; and the Instituto Psicopedagogico de Ninos (1991), an institution for poor, mentally disturbed children. All of these institutions are located within United's proposed service area (United, Ex. #4, pp. 4-5).

52. Mr. Mellado has also provided free entertainment and recreation to patients and members of institutions and organizations such as homes for abused, handicapped, and homeless children, the Police Athletic Club, the Puerto Rico Boys and Girls Clubs, the Head Start Program, a home for abused women, and a home for runaway girls. Each year since 1989, Mr. Mellardo has provided talent free of charge for the local annual television benefit show for the Muscular Dystrophy Association. All of these organizations are within the service contour of United's proposed station (United, Ex. #4. p. 5).

53. Mr. Mellardo does not have the type of broadcast experience which would entitle his integration proposal to further qualitative enhancement.

Luis Arturo Guzman Lluberes

54. Mr. Guzman will be the full-time Sales and Marketing Director of United's proposed station, and he will devote a minimum of 40 hours a week to his duties at the station. In addition, he will be responsible for all other commercial advertising carried by the station, and he will develop, implement, and supervise all the station's strategies regarding sales. In addition, Mr. Guzman will supervise the sales staff, and, as a General Partner, he will actively participate with the other general partners in the formulation of station policy (United, Ex. #3, p. 1).

55. Mr. Guzman, an Hispanic, has resided in Puerto Rico continuously since 1974. All of his residences in Puerto Rico have been within the 1 mV/m contour of United's proposed station. In the event that United receives the permit for the Rio Grande facility, Mr. Guzman will move to Rio Grande, Puerto Rico (United, Ex. #3, p. 3). Since 1984, Mr. Guzman, a producer, has provided free, live entertainment to disadvantaged children and adults in institutions devoted to drug rehabilitation as well as to those dedicated to the care of abandoned and handicapped children, and to the Social Services Department of the City of San Juan. Mr. Guzman is also a member of the Charity Committee and the youth group of the Church of Christ. All of the above activities occurred within the 1 mV/m service contour of United's proposed station (United, Ex. #3, pp. 2-3).

56. Mr. Guzman was employed as an announcer at Station WIAC-FM, San Juan, Puerto Rico from 1974 to 1979. He was also involved in the production of programming and sales at the station, and he developed the concept for and produced the station's first morning show (United, Ex. #3, p. 1). From 1979 to 1983, Mr. Guzman served as Sales Executive and Marketing Manager of Station WUNO(AM), San Juan, Puerto Rico, and he was also involved in changing the station's programming to all news, and then feeding the station's programs to a network of radio stations throughout Puerto Rico (United, Ex. #3, pp. 1-2). Mr. Guzman subsequently worked as a Sales Executive for Television Station WAPA, Channel 4, Guaynabo, Puerto Rico from 1983 to 1984. Since that time, he has been an independent producer and broker of television programs and live entertainment shows in Puerto Rico (United, Ex. #3, p. 2).

Carmen Gonzalez Vega

57. Ms. Gonzalez will devote a minimum of 40 hours a week to her duties at the station as its full-time Business Manager, with responsibility for the station's finances as well as other business matters relating to the station. In addition, she will establish and supervise the station's accounting procedures, including accounts payable and receivable, payroll, and purchasing, as well as implement and supervise the station's billing policies and procedures. Ms. Gonzalez will also supervise the traffic and billing staff of the station, work with the station's accountants, and handle the station's relations with financial institutions (Tr. 755, 806-09; United, Ex. #5, p. 1).

58. Ms. Gonzalez was born in Bayamon, Puerto Rico, and has resided within the 1 mV/m contour of United's proposed station all of her life. In the event that United receives the permit, Ms. Gonzalez will move to Rio Grande, Puerto Rico (United, Ex. #5, pp. 1-2). Since 1985, Ms. Gonzalez has aided primary school teachers of the San Augustin School in Bayamon, Puerto Rico in planning different activities for the school children, such as field days, and from 1990 to 1991, she served as a volunteer with the Boy Scouts of America, Troop 334, helping local leaders organize camps, and plan social and recreational activities for the Troop (United, Ex. #5, pp. 2-3).

Auxiliary Power

59. United will install an auxiliary power source at both its studio and transmitter locations for the purpose of providing continuous broadcast service in the event of a power failure (United, Ex. #1).

Conclusions of Law

Diversification

60. Both Mr. Guzman and Mr. Mellardo have indicated that they intend to divest themselves of their present businesses, in the event that United is the successful applicant. Mr. Mellardo's wife, Ms. Gonzalez, holds the position of Secretary in one of Mr. Mellardo's companies, United Editors, Inc., and Ms. Velez devotes time to helping her husband, Mr. Guzman with his production company. It is clear that Ms. Velez and Ms. Gonzalez connections with their husbands' businesses is solely related to their husbands' ownership of these activities and, once divested, these activities would cease. There is, however, a clear statement in the record from Ms. Gonzalez that she will, in fact, resign as Secretary of United Editors, Inc., the publisher of "Artistas", a bi-monthly periodical, in the event that United is the successful applicant.

61. The Presiding Judge finds, therefore, that United has no chargeable media interests, and its application, therefore, is not subject to a diversification demerit.

Best Practicable Service

62. Mr. Guzman and Ms. Velez, husband and wife, and Mr. Mellardo and Ms. Gonzalez, husband and wife, have been involved in the past in a number of business activities, specifically the production of live and televised entertainment programs. All decisions with respect to these activities were made by agreement among themselves (Tr. 557-58, 616-17, 651, 657, 662, 709, 740, 759-60, 809-11, 847). United's Rio Grande, Puerto Rico application is also a joint venture being pursued by both couples, and United has indicated that in the event of a grant of the application, policy for the proposed station will be set by unanimous consent of all four shareholders, acting as a group (Tr. 698). Minor decisions, however, regarding the day to day operations of each specific department will be made by the party in charge of that department; that individual will also be responsible for executing the station's policy as it applies to that particular department; and each individual will hire personnel best suited for their particular department.

63. Mr. Guzman will organize and be in charge of the sales department, with responsibility for all of the commercial activities of the station. He will supervise one full-time employee, and an additional part-time employee, if needed (Tr. 711-13, 716). Mr. Guzman, along with the other partners, will participate in the formulation of policy for the station. Although Mr. Guzman will be actively involved in selling advertising time, he will serve as Sales Manager, a recognized managerial position. This position entitles the holder to integration credit, even where a significant amount of sales activities accompanies the sales supervision. See *Voce Intersectario Verdad America, Inc.* 100 F.C.C. 2d. 1607, 1617 (Review Board 1985); *Old Time Religion Hour, Inc.* 95 F.C.C. 2d. 713, 726 (Review Board 1983); *MTF Enterprises* 56 R.R. 2nd. 1451, 1453 (Review Board 1984). Mr. Guzman actively participated in the preparation of United's application. He has contributed financially to the venture on an equal basis with his partners (Tr. 753-54), has attended partnership meetings, and he will, along with the others, set policy. Mr. Guzman has shown, therefore, that he is willing and able to assume a full-time management role at the station, and United is, accordingly, entitled to a full-time integration credit for its proposal to integrate Mr. Guzman into the affairs of the station. This credit is qualitatively enhanced by his status as an Hispanic, and his long term residence within the proposed service area of United's station with some civic involvement.

64. Ms. Velez will serve as the station's General Manager. Since the inception of the project, Ms. Velez has played a very active role in its affairs (Tr. 610-17). Ms. Velez and the other partners selected and retained United's consulting engineer, and she was present at the first meeting with the engineer. In addition, she actively participated in selecting and retaining United's lawyer, and she was the first of United's group to contact him (Tr. 614-16, 624). She also signs most of the correspondence with United's attorney (Tr. 624-25), and she presides over partnership meetings (Tr. 759). Furthermore, she arranged for the publication of the public notice regarding the filing of United's application, and she has placed documents in United's public inspection file (Tr. 676-77). Ms. Velez also had a hand in preparing United's application (Tr. 623, 634), and was solely responsible for the preparation of the EEO portion of United's application. As General Manager, she will be responsible for the implementation of the station's EEO program (United, Ex. #2, p. 1), and she will have other significant managerial and supervisory functions. Ms. Velez, along with the other principals, will set station policy and insure its implementation. The Presiding Judge concludes, therefore, that United is entitled to an additional integration credit for its proposal to integrate Ms. Velez. This credit is qualitatively enhanced by her status as an Hispanic, and her long-term residence within the service area with some civic involvement.

65. Mr. Mellardo, as Program Director, will supervise the station's announcers as well as assure that the station's programming policies are implemented. In addition, he, along with the other principals, will establish station policy. There is no evidence of record which calls into question his willingness or ability to meet his duties as Station Manager. The Presiding Judge concludes, therefore, that United is entitled to an additional quantitative integration credit for Mr. Mellardo, which is qualitatively enhanced by his status as an Hispanic, and his long-term residence within the service area with some civic involvement.

66. Ms. Gonzalez proposes to serve as the station's Business Manager. Along with the other partners, she will participate in formulating policy at United's proposed station. She will also be in charge of all general business matters, including the establishment and supervision of the station's accounting procedures, accounts payable and receivable, payroll, purchasing, and the implementation and supervision of the station's billing procedures. She will also handle relations with the bank and sign checks (Tr. 806-07), and supervise one employee (Tr. 779). Although she indicated, during the course of her deposition, that the employee would be part-time (Tr. 781), she testified at the hearing that during budget discussions it was decided that this individual would be full-time (Tr. 783-85). The Presiding Judge finds that Ms. Gonzalez' testimony has consistently shown that she intends to and will assume the duties of Business Manager at United's proposed station, and that there is a reasonable assurance that her proposal will be carried out in the event that United is the successful applicant. He concludes, therefore, that United is entitled to an additional full-time integration credit for Mrs. Gonzalez, which is qualitatively enhanced by her status as an Hispanic and her long-term residence within the service area with some civic involvement.

COMPARATIVE COVERAGE

67. The total areas and populations within each applicant's service area is as follows:

Total Areas and Populations

Applicant	Area	Population
McComas	2,340	1,798,140
United	2,724	1,896,147
Rio Grande	1,569	1,846,573
Passalacqua	1,253	1,441,682

68. The entire area is served by five or more FM stations. None of the applicants will serve an underserved area (Joint Exhibit I).

69. Since the area is already well served, and none of the applicants will provide service to an area or population underserved, the only distinction to be drawn between the four applicants would be based on any coverage difference.

70. There is very little difference between the areas and populations to be served by McComas, United and RGB. Therefore, as between these three applicants, no comparative coverage preference will be awarded. However, all three will serve between 25 percent and 32 percent more people than Passalacqua. Accordingly, McComas, United, and RGB are each entitled to a very slight comparative preference over Passalacqua.

ULTIMATE CONCLUSIONS

71. As noted above, the Presiding Judge found all four integration proposals to be credible. All of the applicants for the Rio Grande, Puerto Rico facility intend to integrate 100 percent of their ownership into positions at their respective stations with managerial responsibility. There is no evidence of record which casts doubt on their ability to fulfill their pledges or their commitment to do so. Alone of the four applicants, Mrs. McComas' application is subject to a diversification demerit which places it at a comparative disadvantage with respect to the other applicants. The Presiding Judge concludes, therefore, that her proposal is inferior to that of Mr. Passalacqua, RGB, and United, and no further consideration will be given Mrs. McComas' application.

72. Of the remaining three applicants, the Presiding Judge was impressed with the degree of commitment of all of the principals to their respective projects. Each principal presented himself or herself as an intelligent and committed individual. Selecting the applicant which proposes the superior service is exceedingly difficult in this instance. Of the three, however, only RGB has a principal who is a long term resident of the proposed city of license, and he represents 51 percent of the equity in the Applicant. RGB's remaining two principals, who collectively represent 49 percent of the equity, are long term residents of the service area and are committed to moving to Rio Grande, Puerto Rico, in the event that RGB is the successful applicant. The Presiding Judge concludes, after weighing the various qualitative enhancements to which each integration proposal is entitled, that these factors distinguish RGB from its competitors. Mr. Marin, who owns 51 percent of the equity of RGB has lived in Rio Grande, Puerto Rico since 1975. As a long term resident of the community of license, it can be assumed that he is aware of the special needs and interests of that community, and as the owner of 51 percent of the equity of RGB, he will be in a position to make certain that RGB's station responds to that need. Admittedly, in view of fact that all of the principals of Passalacqua and United are long term residents of their proposed service areas, this advantage is slight. Nevertheless, the Presiding Judge believes that Mr. Marin's long term city of license residency, coupled with the commitment of the remaining RGB principals to move to the city of license and RGB's very slight comparative preference over Mr. Passalacqua for superior coverage, outweighs any comparative credit to which Mr. Passalacqua is entitled for his past broadcast experience and slightly more significant civic involvement. RGB's proposal is also comparatively superior to United's proposal. The credit to which United is entitled for Mr. Mellardo's moderately more significant civic involvement and Mr. Guzman's past broadcast experience is, comparatively speaking, inferior to those to which RGB is entitled. Accordingly, the Presiding Judge finds that RGB's proposal is superior to that of its three competitors, and its application will be granted.

73. One final matter requires consideration. Mrs. McComas submitted a Petition to Dismiss the Application of Roberto Passalacqua or Alternatively to Reopen the Record and Add Site Availability and Misrepresentation/Candor Issues on July 2, 1992. Mr. Passalacqua submitted an opposition statement thereto to which Mrs. McComas responded, and Mr. Passalacqua then filed an unauthorized supplement to his opposition statement. The Presiding Judge believes, in the interests of reaching an informed decision as to the merits of Mrs. McComas' Petition, that it would be helpful to consider the additional argument set forth in the supplement. *So Ordered.*

74. Mrs. McComas requests, in the aforementioned Petition, that the Passalacqua application be dismissed or, in the alternative, that antenna site availability and related misrepresentation/lack of candor issues be designated against the application of Mr. Passalacqua. In support of her request, Mrs. McComas submits declarations from Jorge Estrada, the owner of the tower designated as Mr. Passalacqua's antenna site, in which, she contends, Mr. Estrada makes it clear that Mr. Passalacqua never had and does not presently have a reasonable assurance of the availability of Mr. Estrada's tower as the site for his antenna.

75. The Presiding Judge is satisfied that the "Amendatory Statement", signed by Jorge Estrada and submitted as part of Mr. Passalacqua's opposition statement, supports his position that he had a reasonable assurance at the time he filed his application of a suitable antenna site. Apparently, however, due to a misunderstanding between Mr. Passalacqua and Mr. Estrada, the site which, parenthetically, Mr. Estrada has made available to Mrs. McComas, is no longer available to Mr. Passalacqua for use as the site of his antenna. Mr. Passalacqua has submitted documentation to the effect that an alternative antenna site is presently available to him. He will, accordingly, submit a petition for leave to amend to this new site in the event that he remains an active party to this proceeding.

RULINGS

IT IS ORDERED that the Motion to Accept Reply Pleading, filed by United Broadcasters Company on April 30, 1992, IS DENIED; that the Motion to Strike, filed by United Broadcasters Company on April 9, 1992, IS GRANTED and the attachment identified as United Ex-

hibit 5 WILL BE STRICKEN; and that the Motion to Strike, filed by Rio Grande Broadcasting Co. on May 11, 1992, IS DENIED.

IT IS FURTHER ORDERED that the Petition to Dismiss the Application of Roberto Passalacqua or Alternatively to Reopen the Record and Add Site Availability and Misrepresentation/Candor Issues, filed by Irene Rodriguez Diaz de McComas on July 2, 1992, IS DENIED.

IT IS FURTHER ORDERED that in the event that Roberto Passalacqua decided to appeal this decision, he will submit in a timely fashion a petition seeking leave to amend his application to reflect a new antenna site.

And IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Rio Grande Broadcasting Co. (File No. BPH-880815MV) for authority to construct a new FM station or Channel 247A in Rio Grande, Puerto Rico, IS GRANTED; and that the applications of Roberto Passalacqua (File No. BPH-880816NN), Irene Rodriguez Diaz de McComas (File No. BPH-880816OR), and United Broadcasters Company (File No. BPH-880816OW) ARE DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — AAD 91-22

Apparent Violations of the Commission's Rules

CONSENT DECREE ORDER

Adopted: November 10, 1992; Released: November 25, 1992

By the Commission:

I. INTRODUCTION

1. On November 9, 1990, this Commission initiated an enforcement proceeding against Southwestern Bell Telephone Company (Southwestern) for apparent violations of the Commission's rules in connection with Southwestern's transactions with the National Exchange Carrier Association, Inc. (NECA).[1] This Order terminates that proceeding by adopting a consent decree negotiated with the carrier.[2] In that decree, Southwestern agrees to make a voluntary payment of $150,000 for deposit into the United States Treasury.

II. BACKGROUND

A. The Proceeding's Scope

2. The subject proceeding arose from two adjustments Southwestern reported to NECA's common line (CL) pool during 1988. The first of these adjustments, in October 1988, reflected a revised circuit equipment study whose implementation increased the circuit equipment expenses Southwestern reported to that pool. The second adjustment, in December 1988, reflected the circuit equipment study that the revised study had replaced. This latter adjustment reduced Southwestern's share of the 1988 CL pool below the level Southwestern otherwise would have received. Southwestern recorded this reduced share in Account 5082, Switched access revenue, rather than in a nonoperating account.

3. In the *Notice*, we tentatively determined that Southwestern's December 1988 adjustment was improper and that Southwestern's use of Account 5082 to record that adjustment's effects was inconsistent with our accounting rules. We advised Southwestern that it was apparently liable for a forfeiture of $250,000 for accounting violations.[3]

4. The *Notice* also ordered Southwestern to show cause why it should not be required to take certain actions. First, we tentatively concluded that Southwestern should have recorded the effects of its December 1988 adjustment in Account 7360, Other nonoperating income, rather than in Account 5082. Based on this tentative conclusion, we ordered Southwestern to show cause why such accounting should not be required.[4]

5. Second, we stated that Southwestern's rate of return reports for 1988 apparently reflected its incorrect accounting practices and, therefore, understated total interstate revenue for that year. We tentatively concluded that Southwestern should compensate for this apparent understatement by including the understated revenue in its next quarterly rate of return report, and we ordered Southwestern to show cause why such action should not be required.[5]

B. Southwestern's Arguments

6. In its response to the *Notice*, Southwestern contended that we should not impose the proposed forfeitures or implement the other actions proposed in the *Notice*. Southwestern argued that it had violated neither the letter nor the spirit of the Commission's separations and accounting rules, and that its actions had been proper. Southwestern argued further that requiring it to record the effects of its reporting in Account 7360 and to adjust its next quarterly rate of return report to include additional revenues would be unreasonable and inconsistent with our accounting rules.

III. DISCUSSION

7. In the proposed consent decree, Southwestern agrees to make a voluntary, tax non-deductible payment of $150,000 for deposit into the United States Treasury. This payment would be excluded from net income calculations for ratemaking purposes and would be recorded in Account 7370, Special charges. In the decree, Southwestern also agrees to make accounting and rate of return report adjustments to reflect the revenue effect of introducing the revised circuit equipment study on a prospective basis as of October 1, 1988. Finally, the decree would terminate the subject proceeding, without impeding our ability to pursue other matters and without prejudging any complaints we might receive pursuant to Section 208 of the Communications Act.[6] As stated in the decree, the Commission makes no finding that Southwestern violated any Commission rule or acted in any manner other than reasonably and in good faith.

8. We have reviewed the terms of the proposed decree, which we hereby incorporate into this Order, and evaluated the circumstances of this case.[7] We believe that the decree's adoption would resolve the issues in this proceed-

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[1] Southwestern Bell Telephone Company, Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7179 (1990)(*Southwestern Notice*).

[2] A copy of the decree is attached to this Order.

[3] *Southwestern Notice*, 5 FCC Rcd at 7180, paras. 11, 14.

[4] *Id.*, paras. 12, 16.

[5] *Id.* at 7180-81, paras. 13, 17.

[6] 47 U.S.C. §208.

[7] Those circumstances include the matters raised in comments that Allnet Communication Services, Inc. (Allnet) filed in this

ing in an appropriate manner, while avoiding the delay, expense, and uncertainty of protracted litigation that would likely result regarding whether Southwestern violated the Commission's rules. Accordingly, we find in the exercise of our discretion to conduct our proceedings in the manner that "will best conduce to the proper dispatch of business and to the ends of justice,"[8] that adoption of the consent decree will serve the public interest.

9. In adopting the consent decree, we recognize that it provides for accounting and rate of return report adjustments different from those proposed in the *Notice*. We believe, based on the record before us, that the adjustments in the decree are more appropriate than those proposed in the *Notice*. As stated previously, this proceeding arose from adjustments that Southwestern reported to NECA during October 1988 and December 1988.[9] Both of these adjustments revised Southwestern's reported circuit equipment costs retroactively to January 1, 1988.

10. When we tentatively concluded in the *Notice* that Southwestern's December 1988 adjustment was improper, we implicitly assumed that Southwestern should have used its revised circuit equipment study throughout 1988. Southwestern, however, did not complete its revised circuit equipment study until September 1988, and, in the normal course of business, Southwestern could not have implemented that study until October 1, 1988. Because of this, we conclude that any resolution should reflect the introduction of the revised circuit equipment study on a prospective basis as of October 1, 1988. Therefore, we also conclude that the proposed decree appropriately provides for accounting and rate of return report adjustments only for October 1, 1988, through December 31, 1988, which is the period the revised study would have been in effect had it been introduced on a prospective basis as of October 1, 1988.

11. Since Southwestern's books of account for 1988 are closed, Southwestern will necessarily reflect its accounting adjustment on its current books of account, rather than its books for any prior period.[10] Consistent with this accounting, the *Notice* proposed that Southwestern include any revenue adjustment in its next quarterly rate of return report, rather than on its rate of return reports for 1987-88. Use of Southwestern's next quarterly rate of return report, however, would create a mismatch between revenue and the period in which it is earned. To avoid such a mismatch, we believe that revision of Southwestern's final rate of return report for 1987-88, as provided for in the consent decree, is appropriate.[11]

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), (j) that the subject Consent Decree, incorporated by reference herein, IS HEREBY ADOPTED and that the Secretary shall sign such Consent Decree on behalf of this Commission.

13. IT IS FURTHER ORDERED that the "Petition for Waiver" filed December 10, 1990, by Southwestern Bell Telephone Company IS DISMISSED AS MOOT.[12]

14. IT IS FURTHER ORDERED that the enforcement proceeding this Commission initiated on November 9, 1990, against Southwestern Bell Telephone Company IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY — AAD 91-221

Apparent Violations of the Commission's Rules

CONSENT DECREE

1. This is a Consent Decree between the Federal Communications Commission (FCC or the Commission) and Southwestern Bell Telephone Company (Southwestern) terminating an enforcement proceeding against Southwestern. The Commission initiated that proceeding on November 9, 1990, through the release of a *Notice of Apparent Liability for Forfeiture and Order to Show Cause* against Southwestern.[1] That *Notice* addressed two adjustments Southwestern reported to the National Exchange Carrier Association, Inc. (NECA) during 1988 to reflect changes in the basic study Southwestern used to separate circuit equipment costs between the interstate and intrastate jurisdictions. The first of these adjustments, in October 1988, reflected a revised circuit equipment study whose implementation increased the circuit equipment expenses Southwestern reported to

proceeding on April 18, 1991. We note, however, that the Common Carrier Bureau's Accounting and Audits Division granted Allnet leave to withdraw from this proceeding. Southwestern Bell Telephone Co., DA 92-1183 (released Sept. 2, 1992).

[8] 47 U.S.C. §154(j).

[9] *See* para. 2, *supra*.

[10] *See, e.g.*, Pacific Bell, Apparent Violations of the Commission's Rules, 6 FCC Rcd 7467, 7468, n.9 (1991).

[11] We note that prior to its withdrawal form this proceeding, Allnet argued that we should require Southwestern to include any understated revenue on its rate of return reports for 1987-88. Allnet Comments at 13-14.

[12] In this motion, Southwestern sought access to and discovery of all materials that formed the basis for the *Notice* in this proceeding, an opportunity to supplement its response to that *Notice*, and an opportunity for an evidentiary hearing on the issues raised in that *Notice*.

[1] Southwestern Bell Telephone Company, Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7179 (1990)(*Notice*).

NECA's common line (CL) pool for 1988. The second adjustment, in December 1988, reflected the circuit equipment study that the revised study had replaced. The reinstatement of this original study decreased by $9.9 million the circuit equipment expenses Southwestern reported to the CL pool for 1988.

2. In the *Notice*, the Commission tentatively concluded that Southwestern had failed to account for the effects of its December 1988 adjustment in the manner prescribed in the Commission's rules. The Commission stated that in December 1988, Southwestern had apparently reported erroneous data to NECA as part of a concerted effort by Southwestern and other carriers to increase the CL pool's rate of return for 1988. The Commission also stated that Southwestern had acted correctly in October 1988 when it reported data to NECA reflecting the revised study and that Southwestern had violated the Commission's rules in December 1988 when it reported data to NECA reflecting the original study.

3. The Commission stated, in addition, that the December 1988 adjustment decreased Southwestern's share of the revenue from the CL pool below the level Southwestern had earned. The Commission also stated that Southwestern apparently accounted for this decrease by reducing revenue in Account 5082, Switched access revenue, in apparent violation of Sections 32.4999 and 32.5082 of the Commission's Rules.[2] The Commission tentatively concluded that Southwestern should have recorded this decrease in Account 7360, Other nonoperating income, rather than in a telecommunications revenue account.

4. In the *Notice*, the Commission also stated that Southwestern's conduct appeared to reflect serious disregard for the integrity of the NECA reporting process and the Commission's accounting rules. The Commission stated further that Southwestern's rate of return reports for 1988 apparently reflected Southwestern's incorrect accounting practices and, therefore, understated its revenue for that year.

5. The *Notice* accordingly ordered Southwestern to show cause why it should not be required to do the following:

a. Pay a forfeiture in the amount of $250,000 for its apparent failure to account for its December 1988 adjustment in the manner prescribed in Sections 32.4999 and 32.5082 of the Commission's Rules;

b. Record the effects of its apparently erroneous reporting in Account 7360; and

c. Adjust its next quarterly rate of return report to include the apparently understated revenues.

6. Southwestern filed its response to the *Notice* on December 10, 1990. In that response, Southwestern stated that its actions complied fully with the letter and spirit of the Commission's separations and accounting rules. Southwestern also stated that its actions had been proper and that it had not engaged in manipulation or disregarded the integrity of the NECA pooling process. Southwestern stated further the Commission's rules leave the timing and propriety of separations study revisions to the carrier's sound business judgment, and that the introduction and the withdrawal of the revised circuit equipment study were based on sound business judgments in light of the information available to Southwestern at the time the judgments were made. Southwestern also stated that it has consistently and appropriately reported information pursuant to the Commission's rules, industry practice, and long-established precedent. Southwestern stated further that no forfeiture could be justified on the basis of any alleged violation of the separations rules.

7. Southwestern stated, in addition, that the *Notice* wrongfully relied on a novel, erroneous, and retroactively applied interpretation of the Commission's accounting rules in an attempt to justify punitive action based on dissatisfaction with Southwestern's separations study revisions. Southwestern also stated that its accounting accurately reflected the actual cash inflows from its settlements with NECA, and that neither due process nor Commission precedent permits the imposition of a forfeiture for that accounting. Southwestern stated further that requiring it to record the effects of its reporting in Account 7360 and to adjust its next quarterly rate of return report to include additional revenues would be unreasonable and inconsistent with the Commission's accounting rules.

8. On April 26, 1991, and May 30, 1991, respectively, Southwestern filed the affidavits of former FCC Common Carrier Bureau Chiefs Albert Halprin and Gerald Brock. These affidavits support Southwestern's positions in this proceeding.

9. All the pleadings and evidence have been submitted to the Commission, and the record in this proceeding is complete. The Commission and Southwestern agree that the expeditious resolution of this proceeding in accordance with the terms of this Consent Decree is in the best interests of the public and Southwestern's ratepayers. The Commission makes no finding that Southwestern violated any Commission rule or acted in any manner other than reasonably and in good faith. Accordingly, the parties agree to the following:

a. In consideration of the Commission's agreement to terminate this proceeding on the terms set forth in this Consent Decree, Southwestern agrees to act as specified in paragraphs 9(b) and (c) of this Consent Decree.

b. Southwestern agrees to pay voluntarily to the United States Treasury, without recourse to a trial *de novo* or any other further protest, the amount of $150,000, within five days of the date on which the Commission releases an order adopting this Consent Decree.[3] Southwestern agrees that no portion of this payment shall be included in net income determinations for ratemaking purposes, and that this payment shall be recorded in Account 7370, Special charges. Southwestern also agrees that it and its affiliates will not claim a federal or state income tax deduction for these payments.

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[2] 47 C.F.R. §§32.4999, 32.5082 (1988).

[3] Payment shall be made by a check or money order drawn to the order of the Federal Communications Commission and shall be for deposit into the General Fund of the United States Treasury. The check or money order shall be mailed or delivered to: Federal Communications Commission, P.O. 73482, Chicago, Illinois 60673-7482.

c. Southwestern agrees to make an adjustment to its current books of account to reflect the revenue effect of introducing the revised circuit equipment study on a prospective basis as of October 1, 1988. Southwestern also agrees that it will make this adjustment by crediting switched access revenue in Account 5082 by the amount of that revenue effect and debiting other nonoperating income in Account 7360 by the same amount, within five days of the date on which the Commission releases an order adopting this Consent Decree. The Commission and Southwestern agree that for rate of return reporting purposes, Southwestern shall report this adjustment on its final rate of return report (FCC Form 492) for January 1, 1987 through December 31, 1988. The Commission and Southwestern also agree that Southwestern shall accomplish this by increasing common "line revenue on that report by the amount of the adjustment, within five days of the date on which the Commission releases an order adopting this Consent Decree. The Commission and Southwestern further agree that Southwestern shall not report this out-of-period revenue effect on its rate of return reports for 1992.

10. In view of the above and in express reliance thereon, the Commission agrees to issue an order formally adopting this Consent Decree (the Consent Decree Order) and terminating all proceedings before the Commission arising from the November 9, 1990 *Notice* against Southwestern, the audit report underlying that *Notice*, and Southwestern's October 1988 and December 1988 adjustments. The Commission further agrees that this Consent Decree serves to resolve all issues now pending or which may be brought against Southwestern before the Commission arising from matters that are the subject of the *Notice* and the underlying audit, other than issues raised in a complaint, if any, filed pursuant to Section 208 of the Communications Act of 1934, as amended. The Commission agrees, in addition, that it will not on its own motion institute against Southwestern new proceedings of any kind arising out of conduct on which that *Notice* and the underlying audit report were based.

11. Agreement by the Commission to this Consent Decree shall constitute a decision to terminate this proceeding without any finding of wrongdoing or liability on the part of Southwestern, or of necessity for sanctions against Southwestern. The Commission agrees that the tentative conclusions contained in its *Notice* and the underlying audit report shall not be used against Southwestern or its affiliates in any other current or future proceeding before the Commission. Nothing contained in this Consent Decree shall preclude the Commission from proceeding pursuant to its November 9, 1990 letter to NECA[4] or addressing matters in regard to the requirements of that letter, except that the Commission shall not in that proceeding make any finding of wrongdoing or liability against Southwestern based on the matters that are the subject of the *Notice* and the underlying audit.[5] It is intended and understood by the Commission and Southwestern that this Consent Decree does not constitute an adjudication of any factual or legal issue raised in this proceeding or in the *Notice* and the underlying audit. By virtue of this Consent Decree, neither Southwestern nor its affiliates shall be precluded or estopped from subsequently litigating any issues, *de novo*, in any other forum, except as expressly provided herein. This Consent Decree and a Consent Decree Order may not be used against either party by either party to this Agreement in any legal proceeding, except as expressly provided herein or as mutually agreed to by the parties to this Agreement.

12. Southwestern admits the jurisdiction of the Commission over it and over the subject matter of this proceeding for the purposes of this Consent "Decree and a Consent Decree Order.

13. Southwestern waives any rights it may have to appeal a Consent Decree Order having the provisions described herein and will not engage in conduct inconsistent with the terms of this Consent Decree.

14. Southwestern agrees that any violation of a Consent Decree Order or of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

15. The Commission and Southwestern agree that the effectiveness of this Consent Decree is expressly contingent upon termination of this proceeding, issuance of a Consent Decree Order as described herein, and Southwestern's compliance with the terms of this Consent Decree. If the Consent Decree is not signed by the Commission or its authorized agent and by Southwestern, or is otherwise rendered invalid, it shall become null and void and shall not become part of the record in this proceeding.

16. If the Commission or the United States of America on the Commission's behalf brings an action in United States District Court to enforce the terms of a Consent Decree Order or of this Consent Decree, Southwestern agrees that it will not contest the validity of either the order or the decree, and will consent to a judgment incorporating the terms of this Consent Decree.

Donna R. Searcy
For the Federal Communications Commission

Danley T. Hubbard
For Southwestern Bell Telephone Company

[4] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990).

[5] *See* Public Notice, Pleading Cycle Established for Comments on Request for Waiver or Modification of NECA Audit Letter, 6 FCC Rcd 3328 (May 24, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VIRGIN ISLANDS TELEPHONE CORPORATION — AAD 90-19

Request for Declaratory Ruling Concerning the Proper Treatment of Certain Interest Expense Under Parts 32 and 64 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1992; Released: November 25, 1992

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. On July 17, 1991, The Virgin Islands Telephone Corporation (VITELCO), in accordance with Sections 1.115 and 1.4(b) of the Commission's rules, filed an Application for Review (Application) requesting the Commission to order that the interest expense relating to a loan by the Rural Telephone Finance Cooperative (RTFC) should be excluded from the calculation of income taxes for interstate ratemaking purposes. An opposition was filed by the National Exchange Carrier Association, Inc. (NECA), and a reply was filed by VITELCO. For the reasons discussed below, we deny VITELCO's request.

2. In June 1987, the Atlantic Tele-Network Company (ATN) acquired 100 percent of the stock of VITELCO from ITT Corporation for $94 million. At that time, VITELCO was financed entirely by stockholders' equity; it had no long-term debt. The book value of VITELCO's stockholders' equity was $52.7 million. ATN initially financed its acquisition of VITELCO with a $94 million bridge loan from E. F. Hutton. On December 30, 1987, ATN obtained permanent financing through a long-term loan from RTFC of $104.4 million. Under the terms of the loan agreement with RTFC, the loan proceeds were to be used to repay the $94 million bridge loan and to purchase RTFC Subordinated Capital Certificates in the amount of $10.4 million. The loan agreement with RTFC also required that the loan be secured by a mortgage on VITELCO's assets and that $60 million of the loan be recorded on VITELCO's books.

3. Consistent with the loan agreement, VITELCO received cash of $49.6 million plus the RTFC Subordinated Capital Certificates for the $60 million of debt it incurred. VITELCO subsequently paid a dividend to ATN of $49.6 million so ATN would have the cash it needed to repay the bridge loan. The effect of these transactions was to change VITELCO from a 100 percent equity financed company to one financed almost entirely by debt.

4. On May 7, 1990, VITELCO filed a Request for Declaratory Ruling concerning the regulatory treatment of the interest expense associated with the RTFC loan. It requested this ruling to resolve a dispute between itself and NECA concerning the manner in which interest on the RTFC loan was treated in determining the amount of income tax expense VITELCO was able to draw from the NECA pools.[1] NECA, treating the loan as a debt of the operating company, was subtracting interest expense attributable to the RTFC loan from VITELCO's income before computing allowable income tax expense that VITELCO was to receive from the NECA pools. VITELCO claimed that the loan should be treated as though it were debt of its holding company, ATN. Interest on holding company debt is not subtracted from operating company income in computing allowable income tax expense. VITELCO would receive a larger share of pooled interstate access revenues under its preferred approach than it would under NECA's approach.

5. On October 15, 1990, the Common Carrier Bureau (Bureau) released the *VITELCO Order*[2] in which it ruled (1) that the interest expense relating to the RTFC loan recorded on VITELCO's books must be included in the computation of income taxes for the purpose of determining interstate revenue requirements, and (2) that VITELCO could not offset the interest income received on the RTFC Subordinated Capital Certificates against the interest paid on the RTFC loan. The Bureau noted that the effect of VITELCO's incurring a debt to RTFC and reducing its equity by payment of the dividend to ATN left VITELCO financed almost entirely by debt.

6. On November 15, 1990, VITELCO filed a Petition for Reconsideration of the *VITELCO Order*, requesting that the Bureau reconsider its decision, and rule that the interest expense relating to the RTFC loan should not be included in the determination of income taxes for ratemaking purposes. It also requested that, if the Bureau again determined that the RTFC interest expense must be included in the income tax calculation, the Bureau allow the interest received for the RTFC Subordinated Capital Certificates to be offset against the interest expense. On June 14, 1991, the Bureau released the *Reconsideration Order*[3] in which it affirmed its decision regarding the accounting treatment of the interest expense relating to the RTFC loan. The Bureau concluded that VITELCO had presented no new arguments regarding the proper treatment of the interest expense. However, based on information provided by RTFC, which explained that the interest it paid on the certificates was

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[1] NECA prepares and files access tariffs on behalf of VITELCO and other telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company. NECA also pools access revenues and distributes these revenues to pool participants.

[2] Virgin Islands Telephone Corporation Request for Declaratory Ruling Concerning Proper Accounting Treatment for Certain Interest Expense Under Parts 32 and 64 of the Commission's Rules, 5 FCC Rcd 5930 (Com.Car.Bur. 1990), (hereinafter *VITELCO Order*).

[3] Virgin Islands Telephone Corporation Request for Declaratory Ruling Concerning the Proper Treatment of Certain Interest Expense Under Parts 32 and 64 of the Commission's Rules, 6 FCC Rcd 3537 (Com.Car.Bur. 1991), (hereinafter *Reconsideration Order*).

merely a refund of interest it received on the loan, the Bureau allowed the interest received on the RTFC Subordinated Capital Certificates to be offset against the interest expense.

II. POSITIONS OF THE PARTIES

7. VITELCO argues that the Bureau's conclusion that its assets have been financed almost entirely by debt is erroneous because it ignores limitations on the use of proceeds in the loan agreement. It states that under the provisions of the agreement the proceeds could only be used to repay the bridge loan, purchase RTFC Subordinated Capital Certificates, and pay costs, expenses and fees incident to the agreement. VITELCO claims that the facts of the financing supplied by RTFC lead to the conclusion that the RTFC funds were used to purchase stock of the telephone company, not regulated telephone company assets.[4] It states that recordation of the loan on its books to permit a mortgage on the assets as security for the loan cannot convert stock acquisition financing into financing for the purchase of assets.[5]

8. VITELCO claims that the Bureau's decision is arbitrary and capricious because it treats the interest differently in 1988 than in 1987. It points out that no interest was taken into consideration in computing VITELCO's taxable income in 1987 when the purchase of VITELCO was financed from the bridge loan on ATN's books. VITELCO indicates that NECA began deducting interest in computing taxes in 1988 when VITELCO had $60 million of debt recorded on its books. VITELCO indicates that the Bureau's failure to treat the interest expense in 1988 on a basis consistent with 1987 renders its decision arbitrary and capricious.[6]

9. VITELCO further argues that if the Commission insists on recognizing the portion of the RTFC debt on VITELCO's books for ratemaking purposes, it should also recognize for ratemaking purposes the entire amount paid by ATN for the stock of VITELCO, including the premium.[7]

10. VITELCO states that the Bureau failed to give adequate consideration to the opinions of two independent accounting firms, Coopers and Lybrand (Coopers), and Deloitte & Touche (Deloitte). Coopers and Deloitte agree with VITELCO that the RTFC loan was used by ATN solely for the purchase of VITELCO's stock, and not by VITELCO for the purchase of assets. Therefore, they contend that VITELCO incurred the interest on behalf of ATN. VITELCO quotes portions of Coopers' and Deloitte's letters where they attempt to draw a correlation between this loan transaction and Part 64 of the Commission's rules.[8] It believes that the Bureau did not entirely address how it could reach its conclusion on the RTFC interest expense in light of the analyses and evaluations presented by these two firms.[9]

11. VITELCO claims that the Commission's Part 64 cost allocation rules are relevant to this loan transaction. It believes that the Bureau has glossed over the affiliate transaction provisions of the Commission's rules, and thus, has misapplied the rules with respect to the RTFC loan. VITELCO states that pursuant to Section 64.902,[10] carriers subject to Section 64.901[11] (allocation of costs) are also subject to the provisions of Section 32.27 of the Commission's rules[12] concerning transactions with affiliates, which directs carriers to the guidelines for recording transactions between a carrier and one of its affiliates. In support of its contentions, VITELCO quotes Coopers' statement that the interest expense represents payments made by VITELCO to or on behalf of ATN for costs associated with ATN's acquisition of common stock.[13]

12. Finally, VITELCO maintains that the Bureau's decision penalizes individuals or companies that acquire a telephone company with debt secured by telephone company assets rather than with equity financing. It argues that as a result of the Bureau's decision, a telephone company whose stock has been purchased with debt secured by the telephone company's assets would receive less reimbursement from the NECA pool solely by virtue of the acquisition because the inclusion of interest expense in the computation of income taxes would reduce the acquired telephone company's reimbursable expenses. VITELCO states that a purchaser that can make the acquisition entirely with equity would not suffer such a reduction. It maintains that this result stands as a deterrent to otherwise qualified buyers who must rely on debt financing and is contrary to the Commission's policy of encouraging new entry and small entrepreneurs. VITELCO explains that the downside from the seller's standpoint is (1) that the pool of prospective buyers will be reduced mainly to those who can accomplish their acquisitions with equity financing and (2) that buyers relying on debt financing will demand purchase price discounts to reflect the reduction in reimbursement from the NECA pool.[14]

13. NECA states in its opposition that VITELCO fails to substantiate the need for Commission review and, therefore, believes the Application should be dismissed. NECA believes that VITELCO's Application merely reintroduces rejected arguments and provides no new evidence whatsoever that the Bureau had erred in its *Reconsideration Order* decision.[15] VITELCO states in its reply, that it is dissatisfied with the Bureau's decision in the *Reconsideration Order*, and that the matter of whether the interest expense relating to the RTFC loan should be included in the calculation of income taxes should be reviewed at the Commission level.[16]

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4 VITELCO's Application at 7.
5 *Id.* at 3.
6 *Id.* at 7.
7 *Id.* at 6.
8 47 C.F.R. Part 64.
9 VITELCO's Application at 8.
10 47 C.F.R. §64.902 (1991).
11 47 C.F.R. §64.901 (1991).
12 47 C.F.R. §32.27 (1991).
13 VITELCO's Application at 10-11.
14 *Id.* at 11-12.
15 NECA Opposition at 2.
16 VITELCO Reply at 2-4.

III. DISCUSSION

14. We have considered the filings by the parties, and we conclude that VITELCO's Application should be denied. After careful analysis and consideration of VITELCO's Application, however, we draw the same conclusion as the Bureau in its *Reconsideration Order*.

15. Because interest expense is deductible for tax purposes, NECA deducts interest expense from a carrier's income before computing allowable income tax expense that the carrier recovers from the NECA pools. To illustrate the effect of this calculation assume Company A and Company B both have an allowable return on investment (ROI) of $100. Assume further that Company A has no interest expense, Company B has interest expense of $70, and the tax rate is 40 percent. Based on these assumptions, the amount each company could draw from the pool for allowable ROI plus income taxes is computed as follows:

	Company A	Company B
1. Allowable ROI (includes interest and net income)	$100	$100
2. Less: Interest expense	0	70
3. Net income portion of ROI (Line 1 - Line 2)	$100	$ 30
4. Allowable income tax expense (Line 3/.60 - Line 3)[17]	67	20
5. Allowable ROI plus income taxes (Line 1 + Line 4)	$167	120

As indicated, Company A would receive $167 from the pool for ROI and taxes and Company B would receive only $120. After paying their respective taxes, however, each company would have an ROI of $100. Essentially, VITELCO's financial structure relates to Company B, *i.e.*, it has interest expense. For purposes of computing its allowable tax expense, however, VITELCO wants NECA to treat it like Company A, *i.e.*, as if it had no interest expense. The effect of allowing VITELCO's method would be to allow Company B to draw $67 from the pool for income taxes when it only had to pay taxes of $20.

16. VITELCO argues that the Bureau's decision to support NECA's approach penalizes individuals or companies that acquire a telephone company with debt secured by telephone company assets rather than equity. We do not agree that the Bureau's decision penalizes debt financed companies. The fact is that interest expense is deductible for tax purposes. Thus, a company with interest expense pays less taxes than a company with no interest expense. As shown in the example, a company with debt and a company without debt receive the same ROI after taxes. The company without interest appropriately collects more for taxes because it must pay more taxes. However, it is not proper to allow a company with interest expense to collect as if it had no interest, because it would then collect for taxes it does not have to pay. Allowing VITELCO to collect from the pool for income tax expense it does not have to pay would be unfair to the other participants in the pool because the other participants would then receive less than they are entitled to receive from the pool. Furthermore, if pool rates were designed to recover costs following VITELCO's proposal there would be the need for a larger pool which would necessitate increased tariffed rates and result in harm to ratepayers. Under the Bureau's decision, a company with interest expense and a company without interest expense would receive the same ROI after taxes and, therefore, both are treated fairly.

17. VITELCO maintains that the RTFC loan was used exclusively to refinance a stock acquisition bridge loan and that no telephone plant was acquired, nor expenses related to the provision of telephone service paid, with the proceeds of this loan. It contends therefore, that this loan relates to ATN's financing of VITELCO's stock, not to the financing of VITELCO's plant. VITELCO further argues that recording the loan on the books of VITELCO (to permit a mortgage of its assets as security for the loan) cannot convert stock acquisition financing into financing for the purchase of assets. This contention ignores the fact that acquisition of 100 percent of the stock of a telephone company results in the acquisition of 100 percent of the plant of that company and that debt incurred to finance such an acquisition is debt incurred to finance the acquisition of telephone plant. In stating that the loan was not used to acquire telephone plant, VITELCO exalts form over substance.

18. VITELCO alleges that the Bureau's decision fails to treat interest expense on a basis consistent with 1987 when ATN had the bridge loan from E.F. Hutton. In 1987, however, all of the debt for the bridge loan and all of the related interest were recorded on the books of ATN. VITELCO had no long-term debt and no interest expense on its books in 1987. In 1988, VITELCO had been converted almost entirely to debt financing recorded on its books. Because VITELCO had no interest expense on its books in 1987, no interest was deducted to determine its income taxes. Because VITELCO did have interest expense on its books in 1988, the interest was deducted in determining its income taxes. The treatment of interest in determining income taxes in each of the years was consistent with the Commission's current practices.[18]

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[17] This step calculates income tax by grossing-up net income. The proof of the calculation is as follows:

	Company A	Company B
Allowable ROI plus income tax	$167	$120
Less: Interest expense (interest is deductible for tax purposes)	0	70
Taxable income	$167	$ 50
Tax rate	.40	.40
Income tax expense	$ 67	$ 20

[18] In consolidated tax returns, the interest on debt is deductible and reduces taxes whether it is recorded on the telephone company's books or the parent company's books. Therefore, we believe interest of the parent, as well as the telephone company, could be justifiably considered in monitoring rate of return and in determining revenue requirements in the revenue pooling process. However, the Commission currently considers only debt and interest recorded on the books of the telephone company in rate of return monitoring and access revenue pooling.

19. VITELCO also states that ATN has not sought to recover the premium paid for the VITELCO stock through the ratemaking process. It argues that, if the Commission insists on recognizing a portion of the debt on VITELCO's books for ratemaking purposes, it should also recognize for ratemaking purposes the entire amount paid by ATN for the stock of VITELCO including the premium. This is not true. The treatment of a premium paid to acquire a telephone company is well established. If the premium were recorded on the books of VITELCO, any portion attributable to a difference between the net book value and the fair market value of assets acquired would be recorded in Account 2005, Telecommunications plant adjustment, and any additional premium would be recorded in Account 2007, Goodwill.[19] The balances in Accounts 2005 and 2007 would be amortized to Account 7360, Other nonoperating income. The balances in these accounts are excluded from ratemaking under the Commission's rules.[20]

20. VITELCO also alleges that the Bureau's decision is arbitrary and capricious because it fails to give consideration to the opinions of two major accounting firms. Those firms indicated that the interest paid by VITELCO on the RTFC loan should be directly assigned to ATN under the Commission's cost allocation and affiliate transaction rules. We disagree. The series of maneuvers whereby VITELCO ended up with $60 million of debt on its regulated books, secured by regulated assets, was not an affiliate transaction. It was, instead, a transaction between the telephone company and an unaffiliated lender. In substance, VITELCO has incurred a debt to RTFC, it must pay interest on that debt, and is obligated to pay off the debt. Moreover, VITELCO's assets could be taken by RTFC in foreclosure proceedings if VITELCO defaulted on the debt. In this case, there is no basis to conclude that VITELCO's regulated assets are not financed by debt to a nonaffiliate, and there is clearly no basis to conclude that the debt to RTFC and interest paid on that debt is an affiliate transaction under Section 32.27 nor is it a nonregulated transaction under Part 64. Thus, Section 32.27 and Part 64 do not relate to this transaction and the two accounting firms have misinterpreted our rules.

IV. ORDERING CLAUSE

21. Accordingly, IT IS ORDERED pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review filed July 17, 1991 by the Virgin Islands Telephone Corporation, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[19] 47 C.F.R. §§32.2005, 32.2007 (1991).
[20] 47 C.F.R. §§65.820, 65.450(d) (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 18, 1992

COMMENTS INVITED ON WISCONSIN PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Wisconsin (Region 45).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 45 consists of the state of Wisconsin. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **December 28, 1992** and reply comments on or before **January 12, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-273 Wisconsin-Public Safety Region 45.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 18, 1992

COMMENTS INVITED ON WESTERN PENNSYLVANIA AREA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Western Pennsylvania (Region 36).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 36 consists of the following counties: Adams, Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Cumberland, Elk, Erie, Fayette, Forest, Franklin, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juniata, Lawrence, McKean, Mercer, Mifflin, Perry, Potter, Snyder, Somerset, Union, Venango, Warren, Washington and Westmoreland. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **December 28, 1992** and reply comments on or before **January 12, 1993.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-274 Western Pennsylvania Area-Public Safety Region 36.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BUSINESS CHOICE NETWORK,
Complainant,

v. File No. E-92-89

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1992; Released: November 18, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. In this order, we address a Motion for Temporary Stay and Emergency Relief (Motion) filed by Business Choice Network (BCN), a reseller of the Software Define Network (SDN) services of American Telephone and Telegraph Company (AT&T). BCN, seeks the issuance of a Commission order "staying the effect of its policies that permit AT&T to terminate service for non-payment of charges and/or to require the advance payment of deposits or advances before continuing to process BCN's orders for new or changed services for its SDN resale offerings to the public ...."[1] In opposition to BCN's Motion, AT&T contends that the Communications Act and Commission's rules do not permit the stay of a carrier's duly filed and effective tariffs. AT&T further contends that, even if the four-part test governing a stay of an agency action or decision were to apply, BCN has not shown that it will suffer irreparable harm nor made the other showings required to obtain the extraordinary relief it seeks. For reasons discussed below, we deny BCN's Motion.

2. In determining whether to grant the extraordinary remedy of a stay of its action, the Commission generally considers whether the petitioner has made a strong showing that it is likely to prevail on the merits on appeal, that irreparable injury would result absent a stay, a stay will not substantially harm other interested parties, and that a stay will be in the public interest.[2] BCN has not shown that it would be irreparably injured by paying the disputed amounts billed to it by AT&T or that it cannot be made whole should it ultimately prevail on the merits of its complaint.[3] The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations.[4]

3. The Commission generally is disinclined to intervene in matters involving a carrier's decision to terminate service of a particular customer that has failed to pay legally effective and overdue tariffed charges for tariffed service that the carrier has duly rendered. Nor is the Commission inclined to second guess a carrier's decision, with respect to a particular customer, to impose deposit, advance payment or other security arrangements provided for in its tariff. Such determinations properly are matters within the carrier's business judgment and, as such, ordinarily will be left undisturbed, absent a showing that the carrier acted unreasonably or unduly discriminated.

4. In this connection, even though *Mocatta Metals,*[5] a case on which AT&T relies, predated the Commission's decisions prescribing unlimited resale for all domestic common carrier services,[6] it nevertheless is instructive. The finding there that the carrier's termination of service for non-payment was lawful assumed that the customer had been properly billed. *Mocatta Metals,* 54 FCC 2d at 118. Carriers are cautioned that a decision to terminate a customer's service, or their refusal to accept or to provision a customer's additional orders for service, particularly when such customer, as here, is a competitor, has grave consequences and should not be taken lightly. Such action would be proper, and not anticompetitive, only if a carrier had "substantially performed" and "reasonably discharged all of its obligations" under its tariff, including, but not limited to, billing accurately and granting credits called for under all of the circumstances of a particular case. *Id.* at 117-18. Whether AT&T's conduct in this regard was, in fact, lawful is an issue to be determined, following further discovery, on the record in the above-captioned proceeding.[7]

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[1] Motion at 8.

[2] Comark Cable Fund III v. Northwestern Indiana Telephone Co., 104 FCC 2d 451, 456 (1985), *citing* Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Big Valley Cablevision, Inc., 85 FCC 2d 973, 978 (1981).

[3] BCN's showing of supposed irreparable harm consists mostly, if not entirely, of conclusionary allegations that it will be "eliminated from the marketplace" and "put out of business" if AT&T cuts off its service (Motion at 3, 5) or "forced to abandon the field" if AT&T does not process its orders. (*Id.* at 8). In light of BCN's failure to show irreparable injury, we need not reach findings urged by AT&T that BCN also failed to meet any of the other criteria of the four-prong test for a stay.

[4] MCI Telecommunications Corp., 62 FCC 2d 703, 705-06 (1976) (Customer may not withhold payment of properly billed tariffed charges for voluntarily ordered services).

[5] *Mocatta Metals Corp.*, 54 FCC 2d 104 (ALJ R. Lozner 1975).

[6] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *modified*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Domestic Switched Network Services, 83 FCC 2d 167 (1980).

[7] AT&T avers that it has complied with all requirements of the Act and the Commission's rules and orders in providing service to BCN and that "[a]ny business problems BCN may have experienced were purely of its own making ..." Verified Answer of American Telephone and Telegraph Company, filed July 24, 1992 (Answer), at ii. In this connection, we note, *e.g.*, BCN's allegation that "SDN filings have been delayed over 12 months and longer before AT&T provides billing detail to BCN." Formal Complaint and Request for Emergency Relief, filed June

5. In view of the foregoing, we conclude that BCN has not met its burden for the extraordinary relief that it seeks.

6. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the Motion For Temporary Stay and Emergency Relief, filed by Business Choice Network on June 8, 1992, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

15, 1992, at 6. AT&T has admitted that billing "for a small percentage of calls has been delayed past the first billing cycle in which such calls could have been billed." Answer at 2. AT&T claims that "a carrier may bill customers for charges for a period of two years after service is rendered." (footnote omitted) Answer at 12. AT&T's reliance on the 2-year statute of limitations in Section 415(a) in this connection is misplaced. That section limits the time when carriers may begin "actions at law," *i.e.* sue in an appropriate court, to recover their lawful charges. It does not govern when a carrier's bill for services furnished should be rendered. American Networks, Inc., 4 FCC Rcd 8797, 8798 (Com.Car.Bur. 1989) (Section 415 does not address what is acceptable time within which to bill).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 2.106 of the Commission's Rules to Allocate 914-916 MHz for Wind Profiler Radar Systems on a Secondary Basis — RM-8092

ORDER EXTENDING TIME FOR REPLY COMMENTS

Adopted: November 18, 1992; Released: November 18, 1992

Reply Comment Date: December 17, 1992

By the Office of Engineering and Technology:

1. On November 13, 1992, the Radian Corporation (Radian) requested that the time for filing reply comments in the above-captioned proceeding be extended from November 17, 1992, to December 17, 1992.

2. Radian states that fully responding to oppositions filed on November 2, 1992 that raise highly technical issues will require it to conduct further engineering studies. Radian further states that counsel for the four commenting parties (Amtech Corporation, EnScan, Inc., American Radio Relay League and Telxon Corporation) have indicated to it that they do not oppose its extension request.

3. Requests for extensions of time are not routinely granted.[1] However, to develop as complete a record as possible on the technical issues raised by this petition, we have concluded that in this particular instance an extension of time is appropriate for the reasons stated by Radian. Accordingly, IT IS ORDERED, that the deadline for filing reply comments IS EXTENDED to December 17, 1992.

4. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241, and 1.46. For further information, contact Carl Huie, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Bruce A. Franca
Acting Chief Engineer

[1] *See* 47 C.F.R. § 1.46.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Video/Multipoint, Inc. File No. 15183-CM-P-83

For Authority to Construct and
Operate a Multichannel Multipoint
Distribution Service station
on the F-group
channels at Stockton, California

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1992; Released: November 27, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of Video/Multipoint, Inc. to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Stockton, California was selected for qualification review as the result of a Commission lottery. Continental Cablevision of California, Inc. (Continental) filed a post-lottery Petition to Deny challenging the application.

2. *Petition to Deny.* Continental alleges that Video/Multipoint failed to disclose the identity of the real-party-in-interest to its application in violation of 47 C.F.R. Sec. 21.13(a).[1] In addition, Continental contends that multiple applications were filed in violation of Section 21.901(d)(2),[2] also known as the one-to-a-market rule.[3]

3. *Discussion.* The allegations by Continental concerning violations of the real-party-in-interest and one-to-a-market rules are not unique to this particular Video/Multipoint application. These allegations, as applied to Video/Multipoint, were considered and rejected by the Commission in *VCI.* For the reasons provided in *VCI,* we find Continental's unsubstantiated evidence insufficient to establish the existence of real-party-in-interest and one-to-a-market rule violations.[4]

4. *Conclusion.* Having carefully considered all the pleadings and the evidence submitted by the petitioner, we find that the allegations raised by Continental when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by Continental Cablevision of California, Inc. IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[1] Section 21.13(a) of the Commission's Rules requires that an applicant must fully disclose the real-party-in-interest to the application. The test for determining whether a person is a real-party-in-interest is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.,* 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.,* 49 FCC 2d 962, 964 (Rev. Bd. 1974); *see KIST Corp.,* 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified,* 102 FCC 2d 288 (1985), *aff'd sub. nom. United American Telecasters, Inc. v. FCC,* 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied,* 107 S.Ct. 2182 (1987).

[2] The one-to-a-market rule prohibits, *inter alia,* the filing of multiple applications. At the time this MMDS application was filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

See, e.g., David Laustsen and Broadcast Data Corp., 3 FCC Rcd 2053 (Comm. Car. Bur. 1988).

[3] Continental argues that Merrill Communications as an undisclosed real-party-in-interest may have been the applicant for more than one MMDS application in Stockton. If true, there would exist violations of both the real-party-in-interest and one-to-a-market rules. *David Laustsen and Broadcast Data Corp.,* 3 FCC Rcd 2053, 2054 (Comm. Car. Bur. 1988).

[4] *See, e.g., Astroline Communications Co. v. FCC,* 857 F.2d 1556, 1536, 1573 (D.C.Cir. 1988)(hereinafter cited as *Astroline);* *Beaumont Branch of the NAACP v. FCC,* 854 F.2d 501 (D.C. Cir. 1988) (hereinafter cited as *Beaumont);* *Gencom, Inc. v. FCC,* 832 F.2d 171 (D.C.Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 394, 397 (D.C.Cir. 1985); *see also, Midland Educational Broadcasting Foundation,* 4 FCC Rcd 5207 (Audio Serv. Div. 1989); *VCI,* 2 FCC Rcd 1895 (1987); *Sherry Rullman and Edna Cornaggia,* 2 FCC Rcd 2011 (1987). We note that Continental failed to submit an affidavit to support its allegations pursuant to 47 C.F.R. Sec. 309(d)(1). *Astroline,* 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont,* 854 F.2d at 507.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 9, 1992

COMMENTS INVITED ON MONTANA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Montana (Region 25).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 25 consists of the state of Montana. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **December 16, 1992** and reply comments on or before **December 31, 1992.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-267 Montana-Public Safety Region 25.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 16, 1992

COMMENTS INVITED ON NEVADA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Nevada (Region 27).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 27 consists of the state of Nevada. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **December 16, 1992** and reply comments on or before **December 31, 1992.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-268 Nevada-Public Safety Region 27.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 9, 1992

COMMENTS INVITED ON OREGON PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Oregon (Region 35).

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 35 consists of the state of Oregon. (General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **December 16, 1992** and reply comments on or before **December 31, 1992.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 92-269 Oregon-Public Safety Region 35.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-258

In the Matter of

Implementation of Section 10
of the Cable Consumer Protection and
and Competition Act of 1992

Indecent Programming and Other Types
of Materials on Cable Access Channels

NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1992; Released: November 10, 1992

Comment Date: December 7, 1992
Reply Comment Date: December 21, 1992

By the Commission:

INTRODUCTION

1. On October 5, 1992, Congress enacted a comprehensive cable television bill, the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992"), Pub. L. 102-385, which substantially alters existing provisions of the Communications Act that govern cable television. Generally, the Communications Act prohibits cable operators from exercising editorial control over the access channels on their systems.[1] Section 10 of the new Act, however, permits cable operators voluntarily to prohibit indecent programming on the leased access channels on their systems. Section 10 also requires, *inter alia*, the Commission to adopt regulations that (1) are designed to restrict access by children to indecent programming on leased access channels of cable systems and (2) enable cable operators to prohibit use of channel capacity on the public, educational, or governmental access channels ("PEG channels") for programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

2. Section 10 of the new Act also amends section 638 of the Communications Act (47 U.S.C. §558), which immunizes cable operators from liability for programming on access channels, by adding at the end of it "unless the program involves obscene material." Thus, if a program is obscene, a cable operator is no longer statutorily immune from liability for programs carried on the PEG or leased access channels of its system.[2] This particular amendment becomes effective without further action by the Commission on December 4, 1992, i.e., 60 days after the new Act's enactment.[3]

3. The purpose of this proceeding is to seek comment on the provisions discussed above that require implementing regulations. In the paragraphs below, we discuss in detail the statutory provisions and our proposals for implementation.

Leased Access Channels--Voluntary Prohibitions by Cable Operators

4. Section 10 amends section 612(h) of the Communications Act, 47 U.S.C. §532(h), relating to cable leased access, to permit a cable operator to enforce a "written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." This provision allows a cable operator, if it chooses, to exclude from leased access channels any programming that the operator "reasonably believes" is indecent.[4] This statutory description of indecency in this section is analogous to the Commission's definitions of indecency that have been applied in both the broadcast and common carrier telephone context and that have been upheld by the courts. *See Dial Information Services v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992) and *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). This statutory authority is self-executing and, therefore, a cable operator's authority to prohibit on leased access channels programming it reasonably believes to be indecent becomes effective on December 4, 1992.

Leased Access Channels--Indecent Matter Required To Be Blocked

5. Section 10 of the new Act also amends section 612 of the Communications Act of 1934 (47 U.S.C. §532) by adding a new subsection (j). Subsection (j)(1) requires the Commission to promulgate regulations within 120 days of the date of enactment of that subsection designed to:

> limit the access of children to indecent programming, as defined by Commission regulations, and which cable Noperators have not voluntarily prohibited under subsection (h) by --
>
> > (A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, in-

---

[1] *See* section 611(e) of the Communications Act applicable to the public, educational, and governmental access channels and section 612(c)(2) of the Act applicable to commercial leased access channels.

[2] Section 639 of the Communications Act, 47 U.S.C. §559, and 18 U.S.C. §1468 prohibit obscene matter on cable systems.

[3] Section 15 of the new Act, which relates to the provision of unsolicited sexually explicit programs on "premium channels" that are offered as part of a cable subscriber promotional effort, also becomes effective 60 days after enactment. *See* FCC Public Notice "Self-Effectuating Provisions of the Cable Television Consumer Protection and Competition Act of 1992" (released November 5, 1992). That section amends section 624(e) of the Communications Act by requiring that cable operators provide 30 days advance notice to subscribers regarding channels that offer X, NC-17, or R rated movies and to block these channels upon subscriber request.

[4] *See* 138 CONG. REC. S646 (daily ed. January 30, 1992).

> tended for carriage on channels designated for commercial use under this section;
>
> (B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and
>
> (C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

Subsection (j)(2) provides that cable operators are required to "comply with the regulations promulgated pursuant to paragraph (1)."

6. We seek comment on the best way to effectuate these provisions. At the outset, we address the definitional issue posed by the new law. Under section 10, cable operators are required to block indecent programming "as defined by Commission regulations." Thus, Congress has left to the Commission the task of defining "indecent programming" for the purpose of implementing the above provision. Congress, however, has provided guidance to us by including a description of indecent programming in that part of Section 10 that permits cable operators, if they so choose, to exclude this type of programming on cable leased access on their systems. As noted earlier, this language is strikingly similar to the Commission's definitions of indecency that have been applied to broadcasting and the telephone medium.[5] We propose, therefore, to track the definitional language used by Congress in the first part of section 10 which refers to programming "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

7. In proposing a definition of indecent programming, we note that the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978), has stated that "each medium of expression presents special First Amendment problems." In light of this statement, we invite comment on whether we should state in this definition that the "community standards" test to be used is one which applies to the cable medium. We note that, in analogous areas, we have tailored our indecency definitions for broadcast programming and telephone communications to the standards applicable to those particular media. It is our intention to faithfully execute the provisions of the statute and, in this regard, we seek comment on how we may do so and also ensure that the statute is implemented in the most constitutionally permissible manner.

8. As set out above, section 10 specifically requires cable operators to place all indecent programming on a single leased access channel and to block access to that channel unless the subscriber requests access in writing. Thus, unlike recently enacted legislation aimed at regulation of indecent programming on broadcast stations,[6] this legislation does not compel cable operators to prohibit indecent leased access programming during a specified period of the day. Instead of this type of "safe harbor" approach, it mandates a "blocking" approach similar in some respects to that contained in section 223 of the Act applicable to providers of indecent communications over common carrier telephone facilities. The explicit references in the legislative history to the "blocking" approach under section 223 reinforces that this type of regulation was deliberately chosen over the "safe harbor" approach that applies on the broadcast side.[7]

9. In essence, under section 10, children's exposure to indecent programs is effectively eliminated unless access to that leased access channel service is specifically requested in writing by the cable subscribing household. Our proposed regulations would codify these statutory requirements by requiring that cable operators place all programming identified as indecent on a single leased access channel, employ appropriate blocking mechanisms, and permit access only if the subscriber so requests in writing. Commenters should provide any relevant suggestions or comments concerning appropriate blocking mechanisms and procedures relating to subscriber access. We also seek comment on our interpretation that, under section 624(d)(2)(A) of the Communications Act, cable operators would still be required to provide a "lock box," upon request, to a subscriber who has specifically requested access to this channel.[8] It is our tentative view that Congress did not mean to preclude a person's right under that section to obtain a lockbox to control access to other cable services on the system or to limit access to this channel to others in the household.

10. Under section 10 it is the program provider, not the cable operator, who must determine if a program is indecent and, hence, must be provided on the blocked channel. Because the cable operator is prohibited under section 612(c)(2) of the Communications Act from exercising editorial control over the leased access channels (unless under the new Act it enforces a written and published policy that prohibits indecent programming),[9] it would appear that the cable operator has no power to require that indecent programming be carried on the blocked channel if the program provider does not identify the program as indecent and so inform the cable operator.[10] We seek comment upon whether the above construction of the statute is correct and, if not, the reasons therefor.

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[5] *See Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 936 n.6 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) and *Dial Information Services v. Thornburg*, 938 F.2d 1535, 1540-41 (2d Cir. 1991).

[6] Just recently, we issued a rulemaking notice to implement the Public Telecommunications Act of 1991, Pub. L. No. 102-356 (August 26, 1992), which, *inter alia*, requires the Commission to issue regulations that would prohibit the broadcast of indecent programming between 6 a.m. and 12 midnight on commercial broadcast stations (6 a.m. and 10 p.m. for certain public broadcast stations). *Notice of Proposed Rule Making in GC Docket No. 92-223 (Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464)*, FCC 92-445, _____ FCC Rcd _____ (released October 5, 1992).

[7] *See* 138 CONG. REC. S646-49 (daily ed. January 30, 1992).

[8] As described in section 624(d)(2), a "lockbox" or parental key is a device that enables subscribers to prohibit viewing of particular cable services within their homes during periods selected by them.

[9] *See* para. 4, *supra*.

[10] *See* section 612(c)(2) which, noted earlier, generally prohibits the cable operator from exercising editorial control over these channels.

11. We also seek comment on whether the cable operator, consistent with section 612(c)(2)'s no censorship provision and with the new amendments under section 10, can require program providers to certify that their programming is not obscene or indecent (as defined by Commission regulations). We assume that cable operators who have a written and published policy of prohibiting indecent material may require such certifications. In view of cable operators' potential liability for carriage of obscene materials, we also assume that all cable operators can require program providers to certify that their programs do not contain obscene materials.

12. Finally, as the statute expressly provides, programmers must inform cable operators if the material sought to be presented on a leased access channel of the system would be indecent as defined by Commission regulation. In order to comply with the single channel requirement, it is evident that cable operators must receive adequate advance notice in order to have sufficient time to channel such programming on their systems. We seek comment on what would be a reasonable time frame for the required notification by a program provider to the cable operator and on whether such notification should be made in writing. We also ask commenters to address whether a cable operator should be held harmless from liability under our proposed rules if it does not receive any, or timely, notification from a programmer. We also seek comment on any other requirements that should be adopted in order to effectuate the new law's provisions. For example, commenters should address whether a cable operator should be required to retain notifications for a prescribed period of time. We also invite commenters to bring to our attention any other matters not discussed in this notice that they believe have an important bearing on the Commission's proposed implementation of the statute.

Public, Educational, and Governmental Access Channels -- Cable Operator-Imposed Prohibitions on Certain Types of Programming

13. Section 10 requires the Commission to promulgate within 180 days of the enactment of the Act regulations that enable a cable operator to prohibit the use of any public, educational, or governmental access facility "for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[11] This section does not require the cable operator to refuse carriage of such programming on these channels but merely allows the cable operator the option of prohibiting such programming.[12] As pointed out earlier, however, the newly-amended section 638 of the Act expressly provides that cable operators are no longer statutorily immune from liability for carriage of obscene materials on these channels.[13]

14. We propose to codify in our rules the authority afforded to cable operators under this new statutory provision. One mechanism that a cable operator might use to enforce a policy of prohibiting this programming would be to require certifications by users or operators that no materials fitting into any of these statutory categories will be presented on these channels. We request comment on this approach. Commenters should also address whether our regulations should provide for any additional matters not expressly addressed in the statute. For example, commenters may wish to address whether specific procedures should be developed to govern disputes between the cable operator and programmer of these access channels. Because these channels are mandated and their conditions of use are defined at the local level, we propose that any such disputes should be handled at the local level. We invite interested persons to comment on these and any other aspects that they believe would be germane to proper implementation of this provision.

15. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. *See* 47 C.F.R. §§1.1202, 1.1203 and 1.1206(a). Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comment on or before **December 7, 1992,** and reply comments on or before **December 21, 1992.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting material. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

16. As required by section 603 of the Regulatory Flexibility Act (Pub. L. No. 96-353, 94 Stat. 1164, 5 U.S.C. §601 *et seq.* (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. The comments must be filed in accordance with the same filing deadlines as comments on the rest of this *Notice of Proposed Rule Making,* but they must have a separate and distinct heading, designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making,* including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act.

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[11] The Senate drafters of this provision appear to have used the term programming involving "sexually explicit" conduct to mean the same types of indecent programming material that may be prohibited by cable operators on leased access channels. *See* 138 CONG. REC. S646 (daily ed. January 30, 1992). The Senate drafters also indicated that the provision relating to "material soliciting or promoting unlawful conduct" was intended to address programming that solicits prostitution. *Id.* at S649.

[12] As noted para. 1, *supra,* section 611(e) of the Communications Act restricts the cable operator from exercising editorial control in other respects.

[13] *See* para. 2, *supra.*

17. Authority for this proceeding is contained in sections 4(i), 4 (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), and 303(r) and section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (1992).

18. Further information on this proceeding may be obtained by contacting Stephen A. Bailey, Office of General Counsel, at (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PROPOSED RULE

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 611, 612, _____ Stat. _____, 47 U.S.C. §§ 531, 532

2. Subpart _____ is amended by adding the following new section:

§76._____ Restrictions on Indecent Programming on Leased Access Channels; Restrictions on Obscene Materials and and Other Types of Materials on Public, Educational, and Governmental Access.

(a) A cable operator may enforce prospectively a written and published policy of prohibiting on leased access channels programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.

(b) All programs intended for carriage on channels designated for commercial leased access use under this section and identified by the program provider as indecent shall be placed on a single channel, except for such programs prohibited by the cable operator pursuant to paragraph (a) above. A cable operator shall block such channel except for subscribers requesting access to such channel in writing.

(c) Program providers on leased access channels shall identify for cable operators no later than seven days prior to the requested carriage any programming that describes or depicts sexual or execretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.

(d) A cable operator may prohibit the use of any channel capacity on the cable system of any public, educational, or govermental access facility for any programming that contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action.

This proceeding is being initiated in order to seek comment on the best way to implement section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, relating to indecent programs on leased access channels of a cable system and to cable operator restrictions on certain programs on public, educational, and governmental access channels.

Objectives.

The Commission's goal is to provide notice and opportunity to comment to members of the public regarding efficacious implementation of section 10 of the new Act.

Legal Basis.

Authority for this proposed rule making is contained in sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303(r) and section 10 of the Cable Consumer Protection and Cometition Act of 1992, Pub. L. 102-385 (1992).

Reporting, Recordkeeping and other Compliance Requirements

The Commission is asking for comment on whether cable operators shall be required to retain any notifications made by program providers that the program they seek to present on the cable system's leased access channels is indecent.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule.

None.

Description, Potential Impact, and Number of Small Entities Involved.

The rules proposed in this proceeding would impose new burdens on all cable operators, including smaller ones, by requiring them to channel indecent programs on leased access to a single channel but would also enable operators to exercise more control over the content of public, educational, and governmental access channels to the extent they involve programs which contain obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

None.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 90
F.C.C. No. 41	

ORDER

Adopted: November 17, 1992; Released: November 17, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 4, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective November 18, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 41 for AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, Dataphone Digital Service, and Local Channel Services.

2. On November 12, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 90.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 41, Contract Tariff Transmittal No. 90 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 41, Contract Tariff Transmittal No. 90, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-77
Phase I

In the Matter of

Billed Party Preference
for 0+ InterLATA Calls

REPORT AND ORDER AND REQUEST FOR SUPPLEMENTAL COMMENT

Adopted: October 8, 1992; Released: November 6, 1992

Comment Date: December 7, 1992
Reply Comment Date: January 6, 1993

By the Commission:

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I. INTRODUCTION

1. This Report and Order considers certain interexchange carrier (IXC) calling card practices in the first phase of our "billed party preference" (BPP) proceeding.[1] In Phase 1, we consider the need to take immediate action in response to the alleged competitive problems resulting from the use of AT&T proprietary calling cards with the 0+ form of access pending our consideration of the costs and benefits of BPP. Consistent with our paramount concern for consumer welfare, and in order to mitigate the competitive problems that result from the use of proprietary IXC calling cards with 0+ access, we will require AT&T to change its current practices by revising its access instructions to card holders. Specifically, we direct AT&T to (1) educate its cardholders to check payphone notices and to use 0+ access only at public phones identified as presubscribed to AT&T; (2) to provide clear and accurate access code dialing instructions on every proprietary card issued; and (3) make its 800 access code number easier to use.

2. We believe that a strict customer education program will solve some of the more immediate competitive problems disclosed by the record in this proceeding, and that it can achieve these results without the disadvantages of customer inconvenience and disruption the other proposed interim solutions would likely entail. In addition, we seek further comment on methods for compensating operator service providers who receive 0+ dialed proprietary card calls and transfer those calls to the proprietary card issuers for completion. Adoption of a billed party preference system of carrier selection for public phones may, in the future, obviate the need for these requirements. As an

[1] This docket was established to examine long term issues related to IXC card practices, including a BPP routing system for all 0+ interLATA calls, and short term proposals by many of AT&T's competitors to restrict the use of proprietary IXC cards with 0+ access. In the Matter of Billed Party Preference for 0+ InterLATA Calls, *Notice of Proposed Rulemaking*, CC Docket No. 92-77, 7 FCC Rcd 3027 (1991) (*Notice*). MCI first proposed restriction of proprietary IXC cards with 0+ access in CC Docket 91-35. In April, 1991, MCI had proposed that the Commission should mandate 0+ dialing as being in the "public domain," so that all carriers issuing calling cards with instructions to use 0+ as the access method are required to make available billing and validation for these cards; carriers that wish to issue proprietary cards should be required to establish an 800 or 950 access method. In addition, MCI advocated that the Commission require that any OSP completing a calling card call using 0+ access not, where feasible, charge more than the applicable rates of the carrier issuing the card, so that consumers would not be exposed to unexpectedly high rates. According to MCI, this 0+ public domain" remedy would enhance competition in the operator services market by reducing AT&T's historical advantage as the carrier that enjoys market power in this market segment. In the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket 91-35, Comments of MCI, filed April 12, 1991, at 3-4, and Reply Comments of MCI, filed April 26, 1991, at 1-2.

immediate solution, however, our educational requirements should significantly reduce consumer confusion and enhance the ability of callers to easily reach their carrier of choice for away-from-home calling.

II. BACKGROUND

3. This Order addresses only the use of IXC proprietary calling cards with the "0+" form of access[2] from public phones.[3] As we described in the *Notice*, public phone lines are presubscribed to a particular IXC or operator service provider (OSP)[4] chosen by the premises owner, aggregator or payphone provider, so that all 0+ interLATA calls originating from that line are routed to that carrier. If the caller wants to charge the call to the card of an IXC who is not the presubscribed IXC, either (1) the caller must "dial around" using an access code[5] for the card issuer, or (2) if the caller dials 0+, thereby reaching the presubscribed carrier, the card issuer must open its card validation database to that carrier. Most IXCs have issued "proprietary" cards whose validation databases are not open to competing IXCs.

4. AT&T began issuing proprietary cards using the card issuer identifier (CIID) numbering format February, 1991, in anticipation of the termination of its transitional post-divestiture obligations to continue sharing with the Bell Operating Companies (BOCs) various calling card issuance, maintenance, and validation systems. The AT&T CIID card was specifically intended to replace AT&T's former Bell System "joint use cards."[6] AT&T established independent CIID card systems to implement this separation of the formerly shared card systems. Similarly, the BOCs established new and separate card validation databases for their joint use cards, the line identification databases (LIDBs). Pursuant to Court and Commission Orders, the LECs must offer their joint use card validation service on non-discriminatory terms, under tariff to all IXCs.[7] AT&T has stated that issuance of its proprietary CIID card ended the anomalous situation whereby the

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[2] *Notice*, 7 FCC Rcd at 3028, paras. 5,6. "0+" describes calls such as collect, credit card, and billed to third party for which the caller dials" plus the called number to place a call.

[3] We use the term "public phone" to describe telephones made available by aggregators to the public. *See* 47 U.S.C. § 226(a)(2), 47 C.F.R. § 64.708(b); *Notice*, 7 FCC Rcd at 3028 n.7. On December 20, 1991, the Competitive Telecommunications Association (CompTel), and nineteen of its member companies, filed a motion in CC Docket 91-115 requesting an interim order that would require American Telephone and Telegraph Company (AT&T) to halt further issuance of proprietary calling cards in the card issuer identifier (CIID) format and authorize all IXCs to validate and bill AT&T's CIID cards until the Commission released a final decision in the docket. On December 27, 1991, the Commission established a pleading cycle for comments regarding the CompTel Motion. Public Notice, 7 FCC Rcd 119 (1991). The Commission released a *Report and Order and Request for Supplemental Comment* in CC Docket 91-115, establishing requirements for certain local exchange carrier (LEC) card practices, without ruling on the CompTel Motion in Docket 91-115. Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, *Report and Order and Request for Supplemental Comment*, CC Docket 91-115, 7 FCC Rcd 3528 (1991) (*LEC Card Practices Order*). The Commission noted that the rule changes advocated in the CompTel Motion concerned the card practices of IXCs, were beyond the scope of Docket 91-115, and would be considered in a separate rulemaking established concurrently to examine IXC card practices. *Id.* at 3540 n.139. The *Notice* in this docket incorporated the CompTel Motion and responsive pleadings into the record. *Notice*, 7 FCC Rcd at 3033 n.41. A list of all commenting parties in Docket 92-77, other than those filing individual letters, is contained in Appendix A. Comments filed in response to the *Notice*, will be referred to as "92-77 Comments" and "92-77 Reply Comments," as appropriate. A list of all parties responding to the CompTel Motion in CC Docket 91-115, is contained in Appendix B. We will refer to comments in response to the CompTel Motion in CC Docket 91-115 as "91-115 Comments" or "91-115 Reply Comments," as appropriate. We also take note of numerous individual letters filed on behalf of state agencies. These letters specifically comment on the 0+ public domain remedy contained in the *Notice*, and have been included in the record in this Docket.

[4] The term "OSP" describes both network-based IXCs that provide operator services, and IXCs that offer their own operator service functionalities while procuring transmission capabilities from other carriers.

[5] An access code is a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence. 47 U.S.C. § 226(a)(1); 47 C.F.R. § 64.708(a). 950- and 1-800 are access code prefixes which all OSPs are currently required to provide. "Equal access codes" use the 10XXX sequence, which allows the public to obtain an equal access connection to the carrier associated with that code. *See* 47 U.S.C. § 226(a)(6); 47 C.F.R. § 64.708(f); Policies and Rules Concerning Operator Services and Pay Telephone Compensation, *Order on Reconsideration*, 7 FCC Rcd 4355 (1992).

[6] The CIID format utilizes a six-digit card issuer identification number, assigned by Bell Communications Research, Inc. (Bellcore), acting as administrator of the North American Numbering Plan, plus a four-digit account number and a four-digit personal identification number (PIN) assigned by the card issuer. The six-digit CIID number allows other carriers to identify the IXC who issued the card, and, where permitted, to send a validation query to that IXC's validation database. The CIID format is available only to card-issuing IXCs. The CIID plan was developed by the BOCs to enable all IXCs to issue 14-digit calling cards in a format which the BOCs could recognize and validate for intraLATA 0+ calls. *See LEC Card Practices Order*, 7 FCC Rcd at 3541.

[7] *See LEC Card Practice Order*, 7 FCC Rcd at 3529; Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rule Making, 6 FCC Rcd 3501, 3506 n.1 (1991). A "LEC joint use card" is defined as one which bears an account number assigned by a LEC, is used for services of the LEC and a designated IXC, and is validated by access to data maintained by the LEC. An "IXC joint use card" bears an account number supplied by an IXC, is used for the services of the IXC and a designated LEC, and is validated by access to data maintained by the IXC. LEC joint use card account numbers are based on either the subscriber's line number or a Revenue Accounting Office (RAO) number. RAO is a non-line numbering system originally created before the AT&T divestiture. *LEC Card Practice Order*, 7 FCC Rcd at 3529 n.2. Both the AT&T and BOC joint use cards were in a 14-digit telephone line number or RAO format; the account and PIN numbers were shared so that a customer might have both an AT&T and a BOC joint use card bearing the identical account number. In the *LEC Card Practices Order*, we required all LECs to establish non-discriminatory means of access to validation data for their joint use cards in accordance with Title II of the Communications Act. The BOCs, pursuant to their Modification Of Final Judgement (MFJ) obligations, were also required to make available to all IXCs requesting it, the validation data for their joint use calling cards. *See United States v. Western Electric Company*, 739 F. Supp. 1 (D.D.C. 1990); *United States v. Western Electric Company*, 698 F. Supp. 348 (D.D.C. 1988).

AT&T joint use card could be validated (through access to the jointly-maintained AT&T/BOC card account database) by its competitors, and put the AT&T card on equal footing with the proprietary calling cards of its principal IXC competitors, whose cards cannot be used to charge calls on another IXC's network.[8]

5. All of AT&T's proprietary CIID cards carry dialing instructions on the back of the card which direct the caller to first dial "0" plus the called number. The card further directs the caller, if he or she does not hear the AT&T brand after the "bong" tone, to hang up and attempt to reach AT&T by dialing its 10XXX equal access code, 10288, plus the called number. AT&T's customer service 800 number is also provided separate from the dialing instructions. The 800 number can also be used to connect the caller to the AT&T network, but first the caller must negotiate a menu of other service options. In addition, AT&T provides mailing inserts with each new card bearing the same dialing instructions. These dialing instructions permit a call to be completed as dialed on the first attempt only at public phones presubscribed to AT&T. When the line is presubscribed to another OSP, that OSP is not permitted to access AT&T's CIID card validation database, and therefore, as a practical matter, cannot complete the call as dialed or bill the caller for any call processing costs incurred. As we stated in the *Notice*, the OSPs claim that customers often become angry at the OSP who is unable to complete their calls. AT&T's competitors also claim that AT&T uses this customer frustration in its marketing efforts to get premises owners and aggregators to presubscribe their aggregator lines to AT&T. In turn, AT&T uses its success in the presubscription market to attract card customers who prefer the convenience of 0+ dialing.[9]

6. We observed, in the *Notice*, that as AT&T increasingly moves its customers to proprietary calling cards that other OSPs cannot validate, the disparity between the relative amounts of commissionable traffic that AT&T and other OSPs can handle may grow larger. Consequently, premises owners and aggregators will face growing incentives to presubscribe their public phones to AT&T, thereby increasing AT&T's competitive advantage with respect to 0+ calling. BPP could reduce this disparity by giving every IXC the same opportunity to offer interested customers 0+ card dialing. Yet, as we noted, BPP can not be implemented immediately.[10] Some of AT&T's competitors have urged the Commission to take immediate action to deny AT&T the ability to derive any competitive advantage from its proprietary card usable with 0+ access.

7. In the *Notice*, we sought separate comment, in an expedited pleading cycle, on proposals from AT&T's competitors to restrict the use of proprietary calling cards for 0+ calling. We particularly sought comment on the proposal that we require all IXCs to either share with other IXCs the billing and validation data for any calling card using 0+ access, or require IXCs to instruct proprietary cardholders to dial access codes, as an interim remedy pending consideration of BPP.[11] Sharing the data would permit the presubscribed carrier to accept a caller's card even if issued by a different carrier, and would enable customers to complete card calls from any telephone. The proposal has been called "0+ public domain" because, according to its proponents, the proposal effectively requires validation and billing data for proprietary IXC cards usable with 0+ access to be put in the "public domain." In contrast, IXCs wishing to retain the proprietary nature of their cards would have to restrict their cardholders to using access codes to reach their networks, even at telephones presubscribed to the card issuer. We sought more specific information and comment on 0+ public domain from its proponents, including how, specifically, 0+ public domain would be implemented and would work.[12]

III. DISCUSSION

A. Marketplace Characteristics of Calling Card Service

8. Proponents of Commission intervention in calling card services have alleged that, under current marketplace structures, competitive problems result from AT&T's introduction of a proprietary 0+ calling card. The threshold determination we must make in this phase of the docket is whether interim relief, in the form of "0+ public domain" or some other remedy, is required to remedy such problems pending action on the billed party preference proposal.

1. Positions of the Parties

9. *Unfair advantage in operator services.* AT&T's competitors maintain that the combination of AT&T's card market share and public phone presubscription share confers three competitive advantages on AT&T. First, AT&T's competitors argue that AT&T's introduction of a card that is both 0+ *and* proprietary imposes an undue competitive disadvantage on them because it significantly increases their costs of doing business, while simultaneously decreasing their revenues.[13] By instructing its cardholders to initially dial using 0+ access, AT&T ensures that its customers will first reach the presubscribed carrier for the public phone who cannot bill the call to AT&T's card. The OSPs claim these call attempts cause them to incur local

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[8] *See* 91-115 AT&T Opposition at 8-10.

[9] *Notice*, 7 FCC Rcd at 3033, paras. 39-40 & n.42.

[10] *Notice*, 7 FCC Rcd at 3030, paras. 20-21, 3033 at paras. 39-41.

[11] *Notice*, 7 FCC Rcd at 3033-34, paras. 36, 42-43.

[12] *Notice*, 7 FCC Rcd at 3034, para. 43.

[13] *See e.g.*, 91-115 CompTel Motion at 4-5, 16-19 (over 50% of calls from some locations cannot be completed as dialed due to AT&T's decision to keep its database proprietary); 91-115 ITI Comments at 6-7 and Reply Comments at 4-7; 91-115 Joint Commenters Comments at 6-9 and Attachments A-D (as of 1/1/92, some OSPs were recording 25-40% unbillable call attempts involving AT&T CIID cards); 91-115 Integretel Comments at 4-5 and Attachments A&B (25-64 percent of 0+ traffic at various locations is AT&T CIID card traffic);91-115 Unit-

access charges, validation fees,[14] and live operator holding time for calls that they cannot complete and for which they cannot receive compensation from the cost causer.[15]

10. Second, they claim that AT&T, and only AT&T, can offer a proprietary card that is usable with 0+ access on a near-universal basis.[16] AT&T's competitors' estimate AT&T's share of public phone presubscribed lines to be between 75 and 80 percent.[17] Sprint maintains that this share means AT&T's cardholders can reach AT&T at roughly four out of every five phones in the nation.[18] Therefore Sprint asserts, as a practical matter, only AT&T can offer a 0+ card that works at most phones. Currently, no other IXC has a presubscription share of appreciably more than ten percent and their customers would have to use an access code for roughly nine out of ten interLATA calls. For customers of other IXCs to use 0+ dialing, they would have to ascertain whether the call is intraLATA or interLATA, and if it is an interLATA call, whether the phone is presubscribed to their preferred carrier. For Sprint, MCI and smaller IXCs to attempt to educate their customers on this complicated process to determine when they should dial 0+ and when they should instead use an access code, would not be a realistic option. Sprint argues that its and AT&T's other competitors' inability to issue such universally usable cards places them at a disadvantage in competing for card customers because their cardholders must dial extra digits to place interLATA calls.[19]

11. Finally, AT&T's competitors argue that AT&T's 0+ CIID card will allow AT&T to increase its share of public phone presubscriptions in the future. Because the CIID card is proprietary, argue these carriers, no presubscribed carrier other than AT&T can handle the 0+ calls made with the card. AT&T's competitors argue that, to retain those calls, which make up the bulk of the public phone traffic that generates commissions, aggregators and premises owners will select AT&T as their presubscribed carrier. The more presubscription locations AT&T gains, the more universally usable its card becomes, thus attracting more card customers. AT&T's competitors argue that this synergistic effect creates inequities in the competition for both card customers and payphone presubscriptions.[20]

12. AT&T disputes its competitors' claims that there is a market problem with respect to IXC cards, public phone presubscriptions and the provision of operator services in general. AT&T argues that its CIID cards are in the public interest and satisfy its customers' needs.

13. As to the card market, AT&T argues that the new proprietary card simply puts AT&T on an equal footing with its principal IXC competitors, who issue proprietary cards. According to AT&T, IXC competition for calling card business is intense. AT&T states that its share of the industry's interstate card minutes was a steady 64 percent for the fourth quarter of 1991 through the second quarter of 1992.[21] AT&T also notes that MCI and Sprint, together, have issued over 32 million proprietary cards –as compared to AT&T's 25 million CIID cards. In addition to these cards, there are over 50 million non-proprietary 0+ LEC cards, substantially more than there were a few years ago. According to AT&T, its new CIID cards represent less than one-fourth of all telephone calling cards in circulation. AT&T maintains that this wide array of choices has put downward pressure on AT&T's calling card market share, and forecloses any basis for concern about "re-monopolization" by AT&T.[22] Keeping its CIID card database proprietary responds to the demands of thousands of AT&T cardholders who were confused when their non-proprietary AT&T/LEC joint use cards were accepted by unknown (or poorly identified) OSPs, often at rates that were several times higher than the AT&T rates they had expected. AT&T argues that its customers want a proprietary AT&T card so that they can be assured of receiving AT&T service and rates. ITI itself has stated that three out of four AT&T cardholders who reach ITI on a 0+ basis choose not to provide an alternative billing mechanism, which, AT&T argues, indicates a desire not to have OSPs complete their calls.[23]

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ed/Sprint Comments at 1; 92-77 Sprint Comments at 1-4; 92-77 ITI Comments at 17; 92-77 ATC Comments at 3-5; 92-77 Phonetel Comments at 4-6.

[14] Comptel argues that OSPs incur validation costs because the AT&T CIID card is a 14-digit card like the universally accessible LEC joint use card. Comptel argues that OSPs cannot distinguish the two, and thus, must first attempt to validate the card number in a LIDB database. The inability to validate' automatically notifies an operator to intervene to ascertain the problem. If the caller chooses not to use another billing mechanism, which is often the case, the OSP cannot recover the associated validation fee, local access charges and operator costs. 91-115 CompTel Motion at 17-18.

[15] *See, e.g.,* 91-115 Joint Commenters Comments at 2-3; Attachments A-D; 92-77 CNS Comments at 7; 92-77 ITI Comments at 5; 92-77 CompTel Comments at 4.

[16] *See, e.g.,* 92-77 MCI Comments at 1-2; 92-77 CompTel Comments at 2; 92-77 ITI Comments at 19.

[17] *See Notice,* 7 FCC Rcd at 3030 n.25, *citing* CompTel and ITI Supplemental Comments at 3, filed November 22, 1991, on Bell Atlantic Petition for Rulemaking to Establish Uniform Dialing Plan From Pay Telephones, RM-6723, April 13, 1989; 92-77 Sprint Comments at 2.

[18] 92-77 Sprint Comments at 1-4. For the same reasons, Sprint argues, the CIID format, which was developed by Bell Communications Research, Inc, (Bellcore) to permit all IXCs to issue 0+ cards usable for both inter- and intraLATA calls, is useful only to AT&T. *See* 91-115 United/Sprint Comments at 1-2 and Reply Comments at 2-3.

[19] *See* 91-115 United/Sprint Comments at 1-2 and Reply Comments at 2-3.

[20] *See, e.g.,* 92-77 Sprint Comments at 1-4; 92-77 MCI Comments at 1-3; 92-77 ITI Comments at 6, 17-20; 92-77 CompTel Comments at 4-5.

[21] *See Ex Parte* Letters filed September 24 and 30, 1992 in Docket 92-77, by Robert H. Castellano, AT&T. Of the 64 percent, 35 percent were charged to the AT&T CIID card, and 29 percent were charged to LEC joint use cards. AT&T's share of interstate card minutes is very close to its share of total interstate minutes for the same period, which is 63 percent.

[22] 91-115 AT&T Opposition at 13 n.**, citing *The Nilson Report,* June 1991, p.1; 92-77 AT&T Reply Comments at ii, 12-13.

[23] 91-115 AT&T Opposition at 10 n.*; 92-77 AT&T Comments at 4 and Reply Comments at 11 n.*; citing 91-115 ITI Comments at 7. AT&T notes that Sprint recently introduced a new telephone line number (TLN)-based proprietary card which can be used on a 0+ basis from Sprint-presubscribed phones, and with 10333 access from other phones. Other IXCs, like MCI, have chosen a TLN-based format but have decided not to make card calling available on a 0+ or 10XXX basis. AT&T asserts that both 0+ and 10222 calls dialed with MCI's card from an MCI-presubscribed phone are delivered by the LECs to MCI, but that MCI has chosen to reject these calls within its own network for

14. According to AT&T, only 68 percent of public phone lines are presubscribed to AT&T, and of those, less than 40 percent are under contract whereby the premises owner or aggregator receives commission payments on 0+ traffic carried by AT&T.[24] AT&T argues that its advantage in public phone presubscriptions is due to its superior product. Many OSPs, in contrast, have chosen to invest virtually nothing in making their services attractive to end users, and, AT&T asserts, seek to compete by creating and preserving arrangements that trap unwary consumers.[25]

15. Finally, AT&T states that the OSPs' own claims of injury are exaggerated. CIID codes are unique codes that are publicly assigned by Bellcore to specific carriers. Thus, any OSP presented with a CIID card can know that the card number cannot be validated in a LEC's system after only 6 digits are entered by the caller, so that there is no need to make any validation query at all.[26] In addition, any effort an OSP makes to get a caller to use a different billing method so that the OSP can handle the call on its own network, is entirely voluntary and within its control. Its competitors can continue to provide operator services by using the millions of 0+ LEC joint use cards that are in the "public domain," by arranging to accept bank credit cards, and by investing in their own cards.[27]

16. AT&T defends its dialing instructions by stating that from most public phones, customers can reach AT&T on a 0+ basis. Where they cannot, AT&T informs them to use an alternate dialing sequence specified in the Commission's equal access rules. AT&T maintains that it has heavily promoted its 10288 access code, so that customers know how to reach AT&T when they see or hear that 0+ access is not available. It argues these instructions are consistent with the Commission's most recent report on the implementation of signage and branding,[28] which shows that audible branding is substantially more reliable in identifying the OSP than the signs at aggregator locations.[29] Thus, AT&T's instruction to its customers to dial 0+ "and hang up if you don't hear AT&T" is one of the most effective and most easily understood ways to tell customers how they can ensure themselves that they reach AT&T.[30]

17. *Unfair Card Marketing Practices.* AT&T's competitors claim that AT&T's undue competitive advantage in the provision of operator services and calling cards has been exacerbated by AT&T's aggressive marketing campaign for payphone presubscriptions. These OSPs state that AT&T has relied on the proprietary nature of its CIID card and its high share of 0+ traffic to convince aggregators that they will lose money and customer good will if they presubscribe to other carriers.[31] AT&T's competitors argue that AT&T's CIID marketing strategy has been winning back aggregators served by competitors. Some aggregators have specifically cited AT&T's representations regarding the restricted use of CIID cards as a major reason for changing their presubscribed carrier to AT&T.[32]

18. AT&T's competitors further contend that AT&T has engaged in a misleading marketing effort aimed at getting its end users to destroy their universally accepted LEC joint use cards and to accept the AT&T CIID card. According to CompTel, AT&T recognizing that its own marketing studies show that customers perceive the CIID card to be somewhat more difficult and cumbersome to use than a line based calling card, told its customers that the change to the CIID format was necessary in order to comply with government requirements.[33] NYNEX submits that AT&T's questionable card marketing approach will cause former joint use card holders to abandon their universally accepted card, and result in more premises owners presubscribing their public telephone lines to AT&T to retain sufficient commissionable traffic.[34]

19. AT&T maintains that its marketing messages to both end users and aggregators are both factually correct and completely unrelated to the proposal before the Commission to declare that 0+ dialing should be in the public domain. AT&T disputes the LECs' claims that it misled their joint use card customers through its CIID card re-

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its own business purposes. Still others have chosen not to issue cards at all, but merely to accept LEC joint use cards, whose database must be open to all IXCs by Commission and Court order. AT&T argues this range of customer choice is precisely what a competitive business like the provision of long distance calling card service is designed to foster. 92-77 AT&T Comments at 6-7. Sprint explains that although its card is usable on a 0+ basis, it instructs its cardholders to always dial an access code because if Sprint cardholders tried to dial 0+ they would reach the wrong carrier from at least nine out of ten public phones. Thus, AT&T's proprietary cardholders enjoy a dialing convenience that no other carrier can match. 92-77 Sprint Comments at 2.

[24] *See Ex Parte* Letter filed September 24, 1992, in Docket 92-77, by Robert H. Castellano, AT&T.

[25] 92-77 AT&T Comments at 6-7 and Reply Comments at 14.

[26] SWBT also notes that AT&T's competitors can purchase two Bellcore products that provide the information required to identify CIID codes before launching a validation query to the LECs. 91-115 SWBT Comments at 4.

[27] 91-115 AT&T Opposition at 7 n.**, 14-15.

[28] "Signage" refers to the requirement that aggregators post on or near the telephone instrument, *inter alia*, thename, address and toll-free telephone number of the provider of operator services. 47 U.S.C. § 226 (c)(1)(A)(i); 47 C.F.R. § 64.703(b). "Branding" refers to the requirement that an OSP, *inter alia*, identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call; for an interim period, OSPs are required to "double brand," or identify themselves twice before connecting and charging the consumer for the call. 47 U.S.C. § 226(b)(1) and (2); 47 C.F.R. § 64.703(c).

[29] 92-77 AT&T Reply at 15 & n.****, *citing Interim Report of the Federal Communications Commission Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990*, dated November 14, 1991, at 16-17.

[30] 91-115 AT&T Opposition at 19-20 and Reply Comments at 6; 92-77 AT&T Reply Comments at 15-16.

[31] *See e.g.*, 92-77 ITI Comments at 18-19; 91-115 CompTel Motion at 8. Ex Parte Letter in Docket 91-115 dated March 3, 1992, to Hon. Alfred C. Sikes from George Vasilikos, Com Systems.

[32] *See* 91-115 CompTel Motion at 16, *citing* Joint Comments of Metromedia Communications Corporation and Metromedia Hotelnet, Inc. at 6, CC Docket 91-115, filed August 15, 1991; 92-77 ComTel Comments at 3-4.

[33] 91-115 CompTel Motion at 5-6, *quoting* Reply of AT&T Co., AT&T Communications Revisions to Tariff F.C.C. No.1, Transmittal No. 2902, at 5-6, filed March 11, 1991, and *citing* Letter from Sharon L. Park, Manager, AT&T Calling Card to unidentified customer, appended as Attachment C.

[34] 91-115 NYNEX Comments at 1-2. In their comments on CompTel's Motion, several other LECs also complained of AT&T's CIID card marketing practices. *See* 91-115 SWBT Comments at 6-7; 91-115 Comments Bell Atlantic at 1-2; 91-115 Pacific Comments at 2; 91-115 Ameritech Comments at 2-3. *See also* 91-115 ITI Comments at 8; 91-115 CompTel Motion at 5-6, 10.

placement program. AT&T argues that its instruction to AT&T joint use cardholders to destroy their old AT&T cards was issued in accordance with Federal Reserve Board requirements under Regulation Z, 12 C.F.R. § 226.12(a). AT&T maintains that any related misunderstandings may be the result of differing interpretations of these requirements by the BOCs. AT&T states that it has nonetheless investigated the incidents referenced by some LECs in their comments on CompTel's Motion and found those reports to be incorrect or misleading.[35] Furthermore, AT&T states that only about one-third of its 25 million CIID cards were issued in its card replacement program. The remaining two-thirds were issued in response to customers' direct requests.[36]

2. Discussion

20. The record confirms the observation we made in the *Notice* that the disparity between the relative amounts of commissionable 0+ traffic that AT&T and other OSPs can handle may grow larger as AT&T increasingly migrates customers to proprietary cards that other OSPs cannot validate.[37] The record does indicate that to retain the commissions associated with those calls, some aggregators have announced that they are terminating their arrangements with other OSPs and subscribing their lines to AT&T at least in part because of the replacement of the AT&T joint use card with the AT&T CIID card.[38] As we observed in the *Notice*, AT&T appears to enjoy an advantage in the presubscription of public phones because AT&T has the largest number of customers placing 0+ calls.[39] AT&T's share of presubscribed public phone lines, however, means that, as a practical matter, only AT&T is able to issue a proprietary card that is usable with 0+ access at a sufficient number of public phones to make its card marketable and workable as a 0+ proprietary card. These advantages, however, do not necessarily require immediate regulatory intervention. As we explain below, the costs of the interim solutions proposed in this proceeding outweigh the benefits. Moreover, we note that we are considering billed party preference as a possible long term solution. In addition, our orders requiring the phased-in unblocking of 10XXX equal access codes at aggregator locations will ultimately decrease the competitive importance of the number of presubscribed locations an IXC has, because all IXC card customers will enjoy roughly the same ability to dial around the presubscribed carrier to reach their carrier of choice. Moreover, while AT&T may have a larger share of public phone presubscriptions than other IXCs, its share is smaller than its competitors claim. Significantly, AT&T pays premises owners and aggregators 0+ traffic commissions for less than 40 percent of its presubscribed locations. It would therefore appear that competition for public phone presubscription is not governed exclusively by the size and amount of commission payments.[40]

21. We also note that customers are choosing from a number of available card options. Of AT&T's 64 percent share of interstate minutes, 35 percent was charged to its CIID card and 29 percent charged to LEC joint use cards. According to AT&T, Sprint and MCI together have issued nearly 7 million more proprietary cards than has AT&T. Although AT&T may have the single largest IXC card base, its CIID cards account for less than twenty-five percent of the total number of calling cards (including LEC joint use cards) on the market.[41] As we will discuss in more detail below, the proprietary nature of AT&T's cards is not itself a competitive problem. IXC proprietary cards are one way to serve the important public interest of permitting consumer choice in the presubscription environment.

22. Further, there are measures that OSPs and customers can take to mitigate the problems arising from proprietary cards using 0+ access. For example, the record indicates that there are steps competing OSPs can take to minimize the costs they incur in processing CIID card calls such as avoiding unnecessary validation fees through identification of the CIID codes prior to sending a validation query to the LECs' LIDBs.[42] We also note that proper signage at aggregator locations, audible branding and unblocking of 10XXX access codes at public phones, in accordance with TOCSIA and our rules and regulations thereunder, will enable customers equipped with accurate proprietary card dialing instructions to reach their carrier of choice more easily and without unnecessary imposition on the facilities of competing OSPs.[43]

23. Some parties also raise concerns about AT&T's CIID card marketing messages to its customers, and about its marketing messages to aggregators and premises owners. Their real concern appears to be not with the marketing

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[35] 91-115 AT&T Reply Comments at 6-7; 92-77 AT&T Reply Comments at 15 n.*.

[36] 92-77 AT&T Reply Comments at 13 n.*; 91-115 AT&T Reply Comments at 2 n.**.

[37] *Notice*, 7 FCC Rcd at 3030, paras. 20-21, 3033 at paras. 39-40.

[38] *See, e.g.*, 91-115 CompTel Motion at 8, 16; 91-115 Joint Commenters Comments at 2-3 and Attachments A-D; 91-115 ComTel Comments at 2-3 and 92-77 ComTel Comments at 3-4. The record also indicates that AT&T's OSP competitors are losing billable 0+ traffic to the AT&T CIID card of anywhere between 25 and 50 percent over previous levels. *Id.* However, it is not clear from the record whether the 0+ traffic loss figures presented by AT&T's OSP competitors represents traffic lost because AT&T's CIID cardholders are dialing 0+ and the OSPs cannot validate the cards, or because AT&T cardholders are placing their calls using AT&T's dial around access code. AT&T's competitors have no legitimate complaint about customers exercising their right to reach their carrier of choice through access code dialing. Protecting this right of consumer choice of carrier is at the very heart of this Commission and Congress' most recent actions in the operator services area.

[39] *Notice*, 7 FCC Rcd at 3033, para. 20.

[40] *Compare Notice*, 7 FCC Rcd at 3030 n.25 (CompTel estimates AT&T's share of public phone lines to be 75 percent); 92-77 Sprint Comments at 2 (Sprint estimates the share to be closer to 80 percent) with *Ex Parte* Letter filed September 24, 1992, by Robert H. Castellano, AT&T (AT&T's share of public phone lines is 68 percent; less than 40 percent are under contract).

[41] *See Ex Parte* Letter filed September 24, 1992, in Docket 92-77, by Robert H. Castellano, AT&T; 92-77 AT&T Reply Comments at ii.

[42] *See* 91-115 SWBT Comments at 4; 91-115 AT&T Reply Comments at 6 n.**.

[43] Our 1991 TOCSIA Report to Congress indicated a problem with aggregator compliance with the signage requirements. *See Interim Report of the Federal Communications Commission Pursuant to the Telephone Operator Services Improvement Act of 1990*, at 15. The data from our 1992 survey of compliance shows continual improvement in industry compliance. The full survey will be released to the public as part of our report to Congress on TOCSIA in November, 1992.

messages themselves, however, but rather with the underlying market conditions that give rise to those messages. We address those underlying conditions, and proposed solutions, in this order and in Phase 2 of this docket. We are also addressing elsewhere the concerns raised by AT&T's marketing messages to its customers.[44]

24. Furthermore, AT&T's policy against allowing its competitors to access its CIID validation database does not prevent a caller from placing a 0+ call and using a different billing mechanism. According to AT&T, there are over 50 million non-proprietary LEC joint use cards in circulation, which may be validated for 0+ calls by all carriers. In addition, calls may be charged on a collect or billed-to-third-party basis, or they may be charged to commercial credit or charge cards, if the OSP makes appropriate arrangements with the card issuers. Finally, OSPs may issue their own calling cards.

25. Nevertheless, we do find that an immediate competitive problem has been created by AT&T's CIID card dialing instructions. This problem cannot be eliminated unilaterally by AT&T's competitors. Because AT&T instructs its cardholders to dial 0 plus the receiving number, without first ascertaining whether AT&T is the presubscribed carrier for that line, its competitors are forced to devote their facilities to uncompleteable and therefore unbillable CIID card calls. Thus, the costs incurred in processing such calls cannot be recovered from those causing the costs to be incurred.[45] Customers are understandably frustrated when their calls, placed in accordance with the dialing instructions AT&T provides for its CIID cards, cannot be completed as dialed. AT&T's competitors' inability to process CIID card calls has caused this customer frustration to be misdirected at the OSP. It then may be communicated to the aggregators, and result in a loss of customer good will for the OSP.

B. The 0+ Public Domain Proposal: Definition and Operation

26. 0+ public domain was originally proposed by AT&T's competitors as an interim remedy for the market problems described in the *Notice* and discussed in Section III.A, *supra*. It was to be a conditional remedy that would give IXC card issuers a choice: either establish and use access codes for proprietary cards, or use 0+ access and open the card validation and billing database to all other IXCs.

27. A key issue regarding the 0+ public domain proposal is whether we should include a requirement prohibiting the card issuer from accepting 0+ calls that are made with proprietary cards, as a means of enforcing the card issuer's dialing instructions. If the card issuer is permitted to complete such a call, despite the cardholder's failure to use an access code, its customers may continue to use 0+ indiscriminately, thus undermining the effectiveness of the 0+ public domain remedy. Accordingly, the *Notice* sought comment on whether card issuers should be required to reject proprietary card calls when cardholders mistakenly use 0+ access.[46] We will address this issue first, because it raises a set of operational issues distinct from those raised by 0+ public domain in general.

1. 0+ Call Rejection for Proprietary Cards

a. Positions of the Parties.

28. AT&T strongly opposes any requirement that would prohibit AT&T from accepting the 0+ calls of its CIID cardholders placed from lines ".presubscribed to AT&T. AT&T argues that a proposal that permits 10XXX calls on such lines but not 0+ calls is technologically unworkable. According to AT&T, IXCs cannot differentiate between incoming 0+ and 10XXX calls because, under existing technical arrangements, LECs do not pass information to IXCs that would enable them to determine whether calls reaching their networks have been dialed on a 0+ or 10XXX basis.[47] Thus, AT&T would not be able to reject only 0+ calls unless its operators were to intervene on every calling card call and ask customers which dialing method was used to place the call. This would seriously inconvenience callers. Moreover, AT&T argues that even if technical arrangements could be worked out, this requirement would still subject AT&T's customers to the pointless inconvenience of having to hang up and redial to reach its network.[48]

29. The alternative, requiring IXCs to give up both 0+ and 10XXX access in order to keep their cards proprietary, was criticized by both AT&T and Sprint. They argue that it would be a major regression, and completely counterproductive, to force IXCs to abandon 10XXX access, given the Commission's earlier finding in CC Docket 91-35 that 10XXX access is more convenient and desirable than 800 or 950 access codes. Moreover, Sprint claims it recently invested a considerable sum to establish 10XXX access for its card in order to compete effectively with the AT&T card.[49]

30. In contrast, supporters of 0+ call rejection maintain that all carriers, and most particularly, the card issuer, must be required to reject 0+ calls charged to proprietary calling cards in order to reinforce the new dialing instructions and ensure that callers consistently use the proper form of access for their cards.[50] Some OSPs acknowledge

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[44] *See* Letter adopted November 3, 1992, By Direction of the Commission, FCC 92-490.

[45] The potentially unrecoverable expenses include local access charges, live operator expenses and, in some cases, card validation fees. *See* 91-115 CompTel Emergency Motion at 17.

[46] *Notice*, 7 FCC Rcd at 3034, para. 43.

[47] Although the Signaling System 7 (SS7) protocol may provide such information, it will take several years for LECs to deploy that capability and IXCs to modify their operator systems to function with it. USTA and several LECs note that LECs and IXCs could reconfigure their networks to block all 0+ traffic at the end office or isolate 0+ traffic on dedicated trunks to the IXCs so that the IXCs could block such traffic. Such a reconfiguration would take time to execute and would require costly and inefficient facility deployment that would be obsolete if BPP is deployed. The LECs maintain that this is not a viable interim solution. *See* 92-77 GTE Comments at 2-3; *accord* 92-77 SWBT Comments at 6-7; Ameritech Comments at 3; NYNEX Comments at 3; US West Comments at 6-7; USTA Comments at 3.

[48] 91-115 AT&T Opposition at 17 n.**; 92-77 AT&T Comments at 8-9 & n.*.

[49] 92-77 Sprint Comments at 9; 92-77 AT&T Reply Comments at 8 n.**; *citing* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 6 FCC Rcd 4736, 4739, para. 10 n.36 (1991).

[50] 92-77 MCI Comments at 4; 92-77 ComTel Comments at 5; 92-77 CNS Comments at 11; 92-77 CompTel Comments at 13; 92-77 ATC Comments at 6-7; 92-77 ZPDI Comments at 8-10 and Reply Comments at 2.

that it will, consequently, be necessary to eliminate 10XXX access for use with CIID cards, thus limiting AT&T to using 800 or 950 code access. However, they argue that unless rejection is required, callers will continue to use 0+ access at non-AT&T phones, and AT&T's competitors will continue to receive CIID card calls at their locations, and incur the expenses associated with these calls.[51]

b. Discussion

31. It is clear from the record that IXCs do not currently receive the information necessary to determine if a proprietary card call was placed by dialing 0+ or 10XXX on an automated basis. Full SS7 facilities deployment and the operator system modifications necessary to enable IXCs to obtain this information will not be available in the near term. Without full deployment of SS7 signaling, AT&T could intervene on all calling card calls originated from phones presubscribed to it and ask customers the dialing method used to make the calls. Or, the LECs could segregate 0+ from 10XXX-dialed calls before sending the traffic to the IXCs. These approaches would either take several years to implement or could be implemented on an expedited basis with significantly higher costs for IXCs, and thus for consumers, or both. A remedy which would take several years to implement cannot provide an immediate, short term solution to these issues pending our consideration of BPP.

32. Furthermore, IXC abandonment of 10XXX access codes for proprietary card calls is clearly not in the public interest. We recently recognized the superiority of 10XXX as compared with 800 and 950 access, and ordered the unblocking of 10XXX codes at payphone and aggregator locations according to a prescribed schedule. We found that the 10XXX access method is an efficient dialing sequence that has met with a high degree of consumer acceptance, and that consumers should be free to utilize that sequence if they wish.[52] We will not now take any action which would deprive end users of this clearly superior form of access.

33. Accordingly, we address below the public interest costs and benefits of a 0+ public domain remedy that does not include 0+ call rejection by the card issuer.

2. Public Interest Benefits and Costs of 0+ Public Domain

a. Positions of the Parties

34. *Benefits.* Most of AT&T's OSP competitors, the private payphone providers, billing and collection clearinghouses, and several LECs, support the proposal to reserve 0+ access for calling cards with open validation databases 4and to mandate proprietary access code dialing for use with proprietary calling cards. Proponents of 0+ public domain submit that its adoption is essential to preserve the competitive market for operator services. They argue that 0+ public domain will eliminate the current frustration and confusion of consumers who discover that their cards are usable at some locations but not at many others. Accordingly, they argue that proprietary cards should be used only with access code calling, and that an IXC should be given the option of retaining a proprietary card database by instructing cardholders to use access codes.[53]

35. MCI and others argue that consumers thus would benefit from higher call completion rates, and competitors would no longer be burdened with the costs of uncompleteable calls,[54] and competition among operator service providers would no longer be impeded by AT&T's advantage as the sole provider of cards usable with 0+ access.[55] CompTel and ITI also argue that 0+ public domain is fully consistent with the terms and objectives of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226[56] and the Commission's rules and regulations adopted thereunder. These provisions are designed to ensure maximum consumer choice in the presubscription environment by requiring aggregators and OSPs to provide notice of the identity of the presubscribed carrier through posting and branding and by prohibiting blocking of access codes to reach competing carriers.[57]

36. Phonetel argues that access to multiple carriers will stimulate price as well as service competition and increase network and service redundancy in the event of service outages or other disruptions on the card issuer's network. A proprietary card usable only on one carrier's network leaves the card holder far more vulnerable to loss of service when that carrier experiences a network outage.[58]

37. The 0+ public domain proponents further argue that the harms of AT&T's proprietary card usable with 0+ access are not counterbalanced by any significant consumer benefit. Sufficient mechanisms already exist for consumers to identify the presubscribed carrier and to dial extra digits if they wish to select AT&T instead. Finally, MCI and

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[51] 92-77 CNS Comments at 11 and Reply Comments at 9; 92-77; CompTel Reply Comments at 11-12; 92-77 ATC Comments at 6.

[52] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket 91-35, *Report and Order and Further Notice of Proposed Rule Making*, 6 FCC Rcd 4736 (1991) at para 10; *Order on Reconsideration*, 7 FCC Rcd 4355 (1992) at para 10 (affirming threshold determination that 10XXX is an efficient form of access that consumers should be able to use when choosing their preferred OSPs).

[53] 92-77 MCI Comments at 1-4; 92-77 LDDS Comments at 2,7; 92-77 Phonetel Comments at 10-11; 92-77 USLD Comments at i, 5-9; 92-77 ATC omments at 1-2; 92-77 CNS Comments at 7-9; 92-77 Cleartel/Com Systems Comments at 6 and Reply Comments at 3-6; 92-77 CompTel Comments at 1-4, 12; 92-77 ComTel Comments at 2-4; 92-77 ITI Comments at 20-23; 92-77 VAC Comments at 5-6; 92-77 NPPA Comments at 2-3, 7; 92-77 ZPDI Comments at 4-7; *see also* 91-115 Centel Comments at 2-3 (0+ access for non-proprietary cards); 92-77 Pacific Comments at 1-2; 92-77 APCC Comments at 16; 92-77 USTA Comments at 8; 92-77 US West Comments at 5.

[54] NPPA argues that, once the costs of uncompleteable calls are eliminated, consumers will benefit from corresponding rate reductions. 92-77 NPPA Comments at 9. CNS states that adoption of the proposed rule will save CNS alone $100,000 to $200,000 per month in out-of-pocket costs it incurs in transferring CIID card calls to AT&T. CNS argues that such savings will have a positive impact on OSPs' overall cost structures and would allow them to compete more effectively with AT&T rates. 92-77 CNS Reply Comments at 17.

[55] 92-77 MCI Comments at 1-3.

[56] Pub. L. 101-435, 104 Stat 986 (1990), 47 U.S.C. § 226.

[57] *See e.g.*, 92-77 ITI Comments at 22; 92-77 CompTel Comments at 7-10.

[58] 92-77 Phonetel Comments at 14.

several OSPs maintain that 0+ public domain should have no adverse impact on the cost of BPP or otherwise affect its implementation.[59]

38. *Costs.* Several IXCs, most LECs, one user group, and several state consumer offices oppose 0+ public domain. AT&T argues that 0+ public domain is an arbitrary restriction on 0+ access which would only harm consumers by impeding their ability conveniently to place calling card calls, and would benefit only the OSPs. It would disserve the interests of tens of millions of customers who have come to rely on their AT&T calling cards to assure they will receive AT&T service and AT&T rates. AT&T, if given the choice under 0+ public domain, states that it would choose to keep its CIID card proprietary. Therefore, the remedy would drive customers away from the 0+ dialing protocol for interLATA calling that the Commission itself has tentatively concluded should be encouraged under BPP.[60] The near term impact would be needless confusion and inconvenience for tens of millions of customers,[61] a consequence not in the public interest.[62]

39. The 0+ public domain argument, according to AT&T, ignores the principle of customer choice, which the Commission's equal access rules establish as the cornerstone of competition in the IXC marketplace. AT&T asserts that its current proprietary CIID format card is in large part a response to customers' demands for protection from OSP practices.[63] In addition, AT&T maintains that it would be anti-competitive to force AT&T or any other IXC to make its own technology and customer data available to competitors because this would distort efficiencies and thwart incentives for innovation by IXCs. It maintains that the Commission's procompetitive policies can only be advanced if IXCs strive to differentiate their services and features.[64]

40. Sprint states that if proprietary cards are defined by the dialing instructions given by the IXC, AT&T would presumably instruct all of its cardholders to begin using its 10XXX or 800 access codes. Such a remedy would do nothing to stem its present advantage in the presubscription of public phones, and may do little, if anything to mitigate the ease-of-use advantage that AT&T's calling card now enjoys over cards issued by other IXCs.[65]

41. Several state commissions and consumer offices oppose placing 0+ access in the public domain.[66] Colorado OCC, for example, argues that telephone consumers desire stability in prices and practices for using public telephones after enduring the significant changes since divestiture.[67]

42. Most of the LECs are opposed to the proposed interim solution. In general, they believe that it is a potentially costly, disruptive, and unworkable remedy and that industry resources would be more wisely spent concentrating on the long-term BPP proposal.[68] The LECs argue that they would be left with stranded investments in network and billing systems made to comply with MFJ court rulings requiring the BOCs to accept all proprietary IXC cards.[69] Bell Atlantic argues the Commission should not make consumers spend thousands of extra hours per year dialing where there is no offsetting benefit to them or to interexchange competition. Bell Atlantic cites the estimate contained in the *Notice* indicating that approximately half the interLATA calls from public phones are made by callers presubscribed to AT&T from stations presubscribed to AT&T.[70] Bell Atlantic estimates that this would represent more than 85 million calls per year from Bell Atlantic payphones alone, and does not include aggregator locations. According to Bell Atlantic, if callers use the AT&T CIID card for only twenty-five percent of these calls, the proposal being considered by the Commission would require consumers to needlessly dial access codes on more than 20 mildion calls a year from its payphones alone. Further, the five-digit Feature Group D access code (10XXX) will become seven digits (101XXXX) in 1995 with the expansion to a four-digit carrier identification code.[71]

43. Bell Atlantic and USTA argue that the remedy could also cause the LECs to lose significant intraLATA revenues because access code calling will divert 0+ intraLATA traffic from the LECs, who currently carry it, to the IXC who issued the card.[72] USTA also points out that the proposal would permit some OSP competitors improperly to avoid the normal costs of doing business in the competitive long distance market, reduce network efficiency, and introduce significant new costs.[73]

b. Discussion

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[59] 92-77 MCI Comments at 5; 92-77 CompTel Comments at 14; 92-77 ComTel Comments at 7; 92-77 ZPDI Comments at 13-14.

[60] *Accord*, 92-77 Sprint Comments at 7, 13-14; 92-77 US West Comments at 5-6; Ameritech Comments at 4; 92-77 Colorado OCC Reply Comments at 5.

[61] 92-77 SDN Users Comments at 1-3. SDN Users also argues that AT&T system enables AT&T's customers to avoid being carried and billed by IXCs that charge higher, non-competitive rates.

[62] 92-77 AT&T Comments at 1, 5-7, 9-10 and Reply Comments at 2, 5-7, 11; 92-77 Colorado OCC Reply Comments at 1-3.

[63] 92-77 AT&T Comments at 1, 4-5 n. ** and Reply Comments at 4-6; 91-115 AT&T Comments at 17-18. SDN Users, an AT&T customer group, argues that AT&T should not be required to share its proprietary validation and billing database with other IXCs. SDN Users states that at customers' request, AT&T invested much time and money to develope a system that precludes sharing of data with other carriers so that customers can avoid being carried and billed by IXCs that charged higher, non-competitive rates than those available from AT&T. SDN Users argues that mandating dial around to reach a specific IXC is not in the best interests of the customer because it is less convenient than 0+ dialing, which users prefer. 92-77 SDN Users Comments at 1-3.

[64] 92-77 AT&T Comments at 4; 91-115 AT&T Opposition at 17.

[65] 92-77 Sprint Comments at 1-4.

[66] *See* 91-115 Iowa Utilities Board Comments at 1-3; 91-115 MDPS Comments at 1-2; 92-77 PUCO Reply Comments at 1-2.

[67] 92-77 Colorado OCC Reply Comments at 1-3.

[68] *See e.g.* 92-77 GTE Comments at 1-6; 92-77 NYNEX Comments at 3-4; 92-77 SWBT Comments at 5-6; 92-77 Ameritech Comments at 2-3; 92-77 US West Comments at 6-7; 92-77 USTA Comments at 2,5; 91-115 United/Sprint Comments at 2.

[69] 92-77 SWBT Comments at 4-5.

[70] *Notice*, 7 FCC Rcd at 3030, n.25.

[71] 92-77 Bell Atlantic Comments at 2-3; *see also* 92-77 GTE Comments at 6.

[72] 92-77 NYNEX Comments at 1-3; 92-77 Bell Atlantic Comments at 3. Bell Atlantic estimates that it stands to lose in excess of $20 million intraLATA operator-assisted call revenues if the proposal is implemented.

[73] 92-77 USTA Comments at 6-7.

44. We conclude that the proposed interim 0+ public domain remedy would not serve the public interest. We conclude that the customer inconvenience, frustration and potential cost it would impose would outweigh the benefits. As we discuss in Section III.C.1, *infra*, we find that a more focused and narrowly tailored remedy will best serve the public interest in the interim while we consider the question of implementing the more comprehensive billed party preference system to replace presubscription at public phones.

45. The record demonstrates that 0+ public domain has significant costs, of which the most important is customer inconvenience. The majority of commenters advocated that, under 0+ public domain, the IXC card issuer should choose whether to would issue a shared access or proprietary card.[74] AT&T has unequivocally stated that, if given the choice, it will keep its CIID card validation database proprietary.[75] The result would be that AT&T's 25 million CIID cardholders would be instructed by AT&T to dial an access code, even from phones presubscribed to AT&T for which 0+ dialing would suffice. Accordingly, the remedy would force AT&T CIID cardholders to dial extra digits where they could otherwise reach AT&T by dialing only 0+.[76] In addition, if BPP is adopted these same customers will again be forced to change their dialing patterns. Thus, the remedy would be unnecessarily disruptive to consumers.

46. It is also uncertain based on the record before us, that a 0+ public domain approach would substantially aid OSP competition for presubscription locations. As we observed in the *Notice*, AT&T is currently able to pay lower commissions per 0+ call than its competitors, yet still offer higher overall commissions due to its larger customer base.[77] While all OSPs would be able to compete equally to carry LEC card traffic and other types of 0+ calls, nothing would prevent AT&T from raising the commission payments on any remaining 0+ card traffic to make itself more attractive to aggregators and premises owners. It is clear that the major competitive benefit of increased parity in the operator services market claimed by the 0+ public domain proponents would only be realized if AT&T elected to open its CIID card database to its competitors. However, AT&T has made it quite clear that it would not open its CIID card database. In addition, the 0+ public domain proponents fail to acknowledge that AT&T's success in public phone presubscription competition may be attributed to factors other than commission payments, such as service quality. Finally, other benefits, such as the avoidance of unrecoverable CIID card call processing costs, can be achieved by the less burdensome consumer education requirement discussed in Section III.C.1, *infra*.[78]

47. We also find the alternative requirement proposed by some parties, that proprietary cards be eliminated *de facto* by requiring all IXCs to open their card databases to other IXCs, would not be in the public interest at this time. IXC proprietary cards are a useful vehicle for permitting consumer choice of carrier. We agree with many of the commenters who note that the availability of both proprietary and nonproprietary cards enables greaterpconsumer choice of carrier in the current presubscription environment.[79] Consumers who want to use 0+ access without ever having to concern themselves with learning access codes, and when to use them, may choose to carry a nonproprietary 0+ card, such as those freely available from the LECs. Such cards can be universally billed and validated. In contrast, consumers who have a strong preference for an IXC may currently choose to carry that IXC's proprietary card. They will be assured of being served only by the carrier of their choice, or by a carrier with whom that IXC chooses to enter into a business relationship.[80] Again, this is a choice currently open to all consumers. Finally, consumers may choose to carry two or more calling cards, each with different attributes and features, so as to maximize their range of choice as to dialing sequence and IXC carrier at all locations.

48. What AT&T's competitors fail to acknowledge is that, as AT&T has argued, the choice of carrier has been made by AT&T cardholders before they reach the public telephone, as evidenced by their seeking to use their AT&T CIID card. According to AT&T, it chose to issue a proprietary card in response to customer complaints about receiving operator services from other carriers. This consumer reluctance to give up AT&T's service is reflected in the fact that, as ITI has noted, three out of four AT&T customers decline the OSP's invitation to complete their calls as dialed by billing them to an alternate billing mechanism.[81] If, as many OSPs argue, some AT&T customers nonetheless want to choose, on a call-by-call basis, to use a competing OSP, they may still do so by charging the call to another calling, credit, or charge card, or to their home number, or collect.

49. In sum, we therefore find that the costs of a 0+ public domain approach as an interim solution outweigh the benefits. The proposal would most likely lead AT&T to move its proprietary card customers completely to dialing

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[74] *See, e.g.*, 92-77 MCI Comments at 4; 92-77 Sprint Comments at 4; 92-77 CNS Comments at 8-9; 92-77 APCC Comments at 16; 92-77 USTA Comments at 8; 92-77 ZPDI Comments at 7.

[75] 92-77 AT&T Comments at 5 and Reply Comments at 5.

[76] If 0+ public domain is defined only in terms of the dialing instructions given by the card issuer (*i.e.*, proprietary cards use proprietary access codes), its efficacy would depend upon customers refraining from dialing 0+ when placing a call with a proprietary card. Thus, 0+ public domain might become ineffective if AT&T cardholders discover that their calls can still be completed at AT&T presubscribed public phones on a 0+ basis. They would be likely to continue to use 0+ access indiscriminately, thus perpetuating the problems described by the OSPs in their comments.

[77] *Notice*, 7 FCC Rcd at 3030, para. 20.

[78] We note that here too, some of the alleged costs imposed on OSPs by AT&T's nonvalidation policy can be avoided by OSP investment in additional technology. For example, some LIDB validation query charges on CIID card calls could be avoided through the purchase of Bellcore products permitting the OSP to identify CIID card codes before launching a LIDB validation query.

[79] Even the 0+ public domain proponents recognize that the policies embodied in TOCSIA support full and informed customer choice of carrier.

[80] AT&T's CIID cardholders may charge their intraLATA calls to their CIID cards pursuant to Mutual Honoring Agreements between AT&T and the LECs. In such cases, CIID cardholders are not assured of AT&T service at AT&T rates; nonetheless, they are assured of service by carriers whom AT&T has chosen to allow to access its CIID card validation database. Similarly, the record indicates that AT&T has made similar database access arrangements with GTE Airfone and Alascom for acceptance of its CIID card. *See* 92-77 ATC Comments at 3 and Reply Comments at 4; 92-77 ZPDI Comments at 6.

[81] 91-115 ITI Comments at 7.

access codes. Therefore, the OSPs' share of billable 0+ traffic would not significantly change over current conditions. Thus, AT&T's attractiveness to aggregators as the presubscribed carrier is not likely to be greatly affected in the interim. Consumer choice would not expand significantly: those consumers who wish to use a different 0+ carrier for each card call they place from a public phone may do so today by acquiring and using a LEC joint use card. The gains which would accrue to OSPs from 0+ public domain, such as the avoidance of unbillable and completeable calls over their facilities, can be accomplished through more targeted means of effective consumer education, as we discuss in Section III.C.1, *infra*. The major gain sought by the OSPs, competitive parity in public phone presubscription, cannot be achieved under the 0+ public domain proposals' conditional choice of either 0+ access with a shared database or proprietary access for proprietary cards.

50. In Phase 2 of this proceeding we will evaluate whether BPP is the best long term solution to the structural competitive problems identified in the *Notice* and in Section III.A., *supra*.[82] If we conclude that it is not, we may again review the condition of the operator services market and reexamine the interim remedies interested parties have proposed in this phase of the docket.

C. Alternative Remedies

51. In the *Notice* we invited parties to discuss alternative proposals presented to address the alleged problems raised by AT&T's introduction of a proprietary calling card, including the costs, benefits and jurisdictional bases of such remedies.[83]

1. Consumer Education

a. Positions of the Parties

52. Many commenters advocated consumer education and related measures as interim solutions to the competitive situation in the operator services market.[84] Bell Atlantic suggests that the Commission should hasten the unblocking of 10XXX access codes and require all calling card issuers to educate their cardholders about the proper way to reach them. NYNEX contends that the Commission should order AT&T to notify its CIID card customers that the traditional line number calling card is still available from the LECs, and that AT&T will continue to honor these LEC line number cards on its network.[85] USLD proposed that AT&T include specific instructions as to the availability of AT&T's mandated 800 access number, in order that its customers be assured of reaching AT&T, if they so desire, without unfairly burdening competitors' networks. ZPDI adds that AT&T should also be required to disclose that a nonproprietary card alternative exists. USLD adds that by requiring proprietary card issuers to educate their customers to dial the applicable proprietary access code before placing a long distance operator assisted call, most of the significant consumer benefits are achieved without the imposition of any costs.[86]

53. CNS observes that AT&T has not made its 800 access number easy for its customers to find or use. CNS notes that although Commission regulations under TOCSIA require OSPs to maintain 800 or 950 access numbers, AT&T has yet to establish and effectively promote an 800 or 950 access number that automatically connects calls upon entry of the calling card account number. Instead, AT&T has placed its 800 customer service number on the backs of its CIID cards, but that number is not included as part of the card dialing instructions. Thus, customers may not realize that they can use that number at public phones where AT&T's 10XXX access code is blocked. CNS states that should a customer dial the 800 customer service number, the caller is first given a menu of service options, and then told to hang up and dial the AT&T network via its 10XXX code. CNS states that AT&T's 800 access number is not well advertised, is no more convenient to use than its 800 customer service number, and does not comply with the Commission's requirements.[87]

54. AT&T supports Bell Atlantic's argument that hastening the unblocking of 10XXX access at aggregator phones will mean that the other carriers will have to handle fewer calls destined for carriers other than the presubscribed IXC. AT&T also advocates enforcement of existing signage and audible carrier identification (branding) on all operator service calls at aggregator locations as the means to decrease the inconvenience, frustration and confusion customers experience at aggregator locations as a result of 10XXX code blocking and inadequate signage identifying the 0+ carrier.[88]

b. Discussion

55. We find that consumer education is the interim remedy best suited to the immediate consumer and competitive problems caused by AT&T's dialing instructions. As an interim matter, pending a final resolution of this docket, this remedy best balances the interests of AT&T's cardholders, AT&T's competitors, and AT&T. AT&T's dialing instructions have directed CIIDcardholders to dial 0+ first, and then hang up if they do not hear the AT&T brand. AT&T's competitors, as the presubscribed carriers, receive these calls and incur processing costs. This can

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[82] *Notice*, 7 FCC Rcd at 3030, paras. 20-21, 3033 paras. 39-41.

[83] *Notice*, 7 FCC Rcd at 3034, para. 43.

[84] *See e.g.*, 92-77 ATC Comments at 4-5; 92-77 ZPDI Comments at 6-7; 92-77 Cleartel/Com Systems Comments at 13; 92-77 USLD Comments at 8.

[85] 92-77 Bell Atlantic Comments at 1-4; 91-115 NYNEX Comments at 2 and 92-77 NYNEX Comments at 3. *Accord* 92-77 SWBT Comments at 4; 92-77 WilTel Reply Comments at 4 (and provide CIID card users with instructions on replacing any LEC cards that have been destroyed or discontinued).

[86] 92-77 ZPDI Comments at 7-10; *accord* 92-77 Sprint Reply Comments at 6 (LECs, not AT&T, should contact affected customers); 92-77 USLD Comments at 14. Several commenters contend that AT&T must be required to re-issue its CIID cards with correct dialing instructions. 92-77 Cleartel/Com Systems Comments at 13; *accord* 92-77 ATC Reply Comments at 3; 92-77 ZPDI Comments at 7. These parties argue that mere notice of a change in the access method is not likely to be effective in changing users' 0+ dialing habits.

[87] 92-77 CNS Comments at 9 n.13, 13, *citing* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 6 FCC Rcd 4736, 4743 (1991); 47 C.F.R. § 64.704(d) (all providers of operator services shall establish an "800" or "950" access code number within six (6) months of the effective date of this paragraph); *accord* 92-77 Phonetel Comments at 4; 92-77 Cleartel/Com Systems Comments at 4-5 n.6.

[88] 92-77 AT&T Reply Comments at 10 & n.***.

easily be avoided by dialing instructions that clarify when, and under what circumstances, AT&T must be reached by dialing 0+ and when, and under what circumstances, AT&T must only be reached by dialing one of its access code sequences.

56. We have concluded that the interests of AT&T cardholders and the public in effective competition for operator services are best served through prompt imposition of comprehensive consumer education requirements on AT&T.[89] We find that any costs to AT&T of carrying out this remedy are far outweighed by the gains in consumer convenience and competition. If AT&T educates all of its customers to check public phone signage before dialing, and to dial 0+ only where AT&T is identified as the presubscribed carrier, its competitors should receive significantly fewer misdirected calls. Additionally, AT&T must establish and promote use of a convenient 800 access code number -- one that provides immediate access to operator services for call completion -- in accordance with TOCSIA and our rules thereunder, for use with its CIID card. Once these actions are taken, AT&T's customers will benefit from being able, in most cases, to complete their card calls as dialed on the first attempt, without needlessly reaching the facilities of carriers who cannot complete CIID card calls. These actions, together with our recent order reaffirming our direction to aggregators to unblock 10XXX codes in accordance with our prescribed schedule,[90] should make away-from-home calling more user-friendly in the near term. Moreover, these results can be obtained without forcing a change in the dialing habits of AT&T cardholders.

57. Accordingly, we require AT&T to (1) educate its cardholders to check payphone signage and to use 0+ access only at phones identified as presubscribed to AT&T; (2) to provide clear and accurate access code dialing instructions on every proprietary card issued; and (3) make its 800 access code number easier to use. We require AT&T to file with this Commission its plan for meeting this consumer education mandate. We will review all educational materials AT&T prepares to ensure that these materials effectively inform consumers of proper dialing instructions.[91]

2. Other Proposals

a. Positions of the Parties

58. BellSouth urges that we exercise Title II jurisdiction over IXC card validation and billing data services and require all IXCs to provide such data on a tariffed basis to all OSPs seeking to complete a 0+ call billed to an IXC card. This proposal would effectively eliminate any IXC proprietary card offering because all the IXC card validation databases would be placed in the "public domain", just as the LEC card validation databases have been.[92]

59. APCC requests the Commission to exercise either Title I or II jurisdiction to impose a non-discrimination requirement on AT&T's CIID card validation service. APCC complains that AT&T's CIID card is not a true proprietary card because AT&T selectively allows certain carriers, particularly the LECs and GTE Airfone, to validate and bill the AT&T CIID cards for calls over their networks. APCC maintains that this is a discriminatory and anticompetitive practice that harms intraLATA 0+ operator services competition in those areas where OSPs compete with LECs.[93]

60. Sprint argues the Commission should prohibit the payment of commissions by AT&T for proprietary CIID card calls that use 0+ access. Sprint submits that the removal of this traffic as a basis for public phone presubscription competition will eliminate aggregator incentive to prefer AT&T and therefore create a level playing field for all OSPs to gain market share.[94]

61. CNS requests that the Commission take various actions aimed at reducing OSPs operating costs, including favorable action regarding a proposed service for transferring CIID card calls to AT&T and instituting a review of LEC billing and collection practices.[95] Cleartel/Com Systems also argue that the Commission should require AT&T to compensate other IXCs for the costs they incur as a result of CIID cardholders dialing 0+ at phones not presubscribed to AT&T.[96] Other parties have proposed various refinements to the 0+ public domain concept. Cleartel/Com Systems have revived the original MCI proposal that there be an OSP rate cap for all 0+ calls charged to a competing carrier's calling card.[97] ZPDI, in an *ex parte* presentation, proposed a form of limited access to AT&T's CIID card validation database for all 0+ CIID card calls placed over OSP facilities, together with rates capped at AT&T levels, as an incentive to ensure that AT&T aggressively and properly educates its cardholders about how to access the AT&T network directly.[98]

b. Discussion

62. We decline to adopt any of these alternatives to, or refinements upon, the 0+ public domain proposal at this time. Each would either involve significant structural changes to the current operator services market, with the attendant costs, customer confusion and disruption which follow such changes, or appears unlikely to achieve its desired result, or both. Sprint has not persuaded us as to the effectiveness of a prohibition on commission payments. For example, AT&T could increase the commissions it pays on other 0+ calls, offsetting any reduction in commission

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[89] The record indicates that AT&T is the only IXC currently issuing a proprietary card instructions to first dial 0+.

[90] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, *Order on Reconsideration*, CC Docket 91-35, 7 FCC Rcd 4355 (1992).

[91] AT&T must submit its plan, and both the schedule and means of distribution, for our review no later than 30 days from release of this Order. including drafts of all materials it will provide customers. We delegate to the Common Carrier Bureau authority to review these materials and order any necessary changes in content.

[92] 92-77 BellSouth Comments at 1-4.

[93] 92-77 APCC Comments at 1-7; 12-14; 19.

[94] 92-77 Sprint Comments at 4-6; 15.

[95] 92-77 CNS Comments at 16.

[96] 92-77 Cleartel/Com Systems Reply Comments at 7.

[97] 92-77 Cleartel/Com Systems Comments at 6-12.

[98] *See Ex Parte* Letter dated August 11, 1992 from Danny E. Adams, on behalf of ZPDI, Inc. Subsequently, nearly twenty OSPs joined ZPDI, Inc. in advocating the rate cap concept. *See Ex Parte* Letter dated September 18, 1992, from CompTel, *et al.*

payments for 0+ CIID card calls. This remedy might not, as a practical matter, substantially change the incentives created in the current operator services market by AT&T's dominant position.

63. CNS' proposals regarding LEC billing and collection practices have been addressed previously, and are, moreover, beyond the scope of this proceeding.[99] APCC's proposal is also beyond the scope of the issues in this proceeding because it focuses on the question of LEC/OSP competition for 0+ intraLATA traffic. We decline to adopt ClearTel/Com Systems', CompTel's and ZPDI's refinements to the 0+ public domain concept for the reasons stated in Section III.(B), *supra*. The proposed refinements, which are aimed only at the issue of customer rate expectations, do not alleviate the concerns that caused us to reject 0+ public domain. Instead of these proposals, we are confident that the interim remedy we do impose, aggressive education of AT&T CIID cardholders regarding when and how to use AT&T's access codes, and improvement of AT&T's 800 access number, strike the best balance pending a final resolution of this docket.

64. In addition to these requirements, we seek further comment on methods for compensating operator service providers who continue to receive 0+ dialed proprietary card calls and who wish to transfer those calls to the card issuer for completion. Specifically, we seek comment on the interconnection arrangements needed to provide this transfer service, including arrangements between and among IXCs and LECs. Further, parties are to comment on whether such a transfer service should be provided under tariff, by carrier-to-carrier contract, or through a compensation mechanism in the nature of the mechanism we recently adopted to compensate private payphone providers for dial around access code calls routed to carriers not presubscribed to their payphones.[100] We also seek comment on how such a transfer service can be provided consistent with the anti-splashing provisions of Section 226(b)(1)(H) of the Act, including comment on technical limitations which would preclude OSPs from being able to provide the transfer service without splashing the call. Any party advocating that the service be provided under tariff must address the following questions: (1) what is the definition of the service being provided; (2) when would the transfer charges be assessed; (3) should OSPs be required to confirm that the call was received by the IXC before the transfer charge is assessed; (4) how will IXCs subscribe to the service; (5) what cost elements would be recovered through the tariffed rate; and (6) what type of cost support are the OSPs seeking to provide such service prepared to include with their proposed tariffs?[101]

IV. CONCLUSION

65. In this Report and Order, we have reviewed certain alleged problems arising from AT&T's calling card practices, and several proposals for interim remedies AT&T's competitors have proffered to cure them. Based upon the record developed in this proceeding, we decline at this time to adopt the 0+ public domain proposal or adopt any of the specific alternative remedies discussed in Section III.C.2, *supra*. Instead, we require AT&T to (1) educate its cardholders to check payphone signage and to use 0+ access only at phones identified as presubscribed to AT&T; (2) to provide clear and accurate access code dialing instructions on every proprietary card; and (3) make its 800 access code number easier to use. In addition, we seek further comment on methods for compensating operator service providers who receive 0+ dialed proprietary card calls and transfer those calls to the card issuer for completion. If we do not adopt a billed party preference approach, we may reconsider whether further action is needed to address any problems identified as then remaining in the operator services market and evaluate the long term efficacy of the solutions we adopt today.

V. ORDERING PARAGRAPHS

66. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, and 218 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154, 201-205, and 218 the policies, rules and requirements set forth herein are ADOPTED.

67. IT IS FURTHER ORDERED that AT&T must submit for our review no later than 30 days from the release of this Report and Order its plan for implementing this Order, including drafts of all materials it will provide to cardholders, and the schedule and means of distribution.

68. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau, is delegated authority to act upon matters pertaining to implementation of the policies, rules and requirements set forth herein.

69. IT IS FURTHER ORDERED that the CompTel emergency motion for an interim order requiring AT&T to cease further distribution of "proprietary" CIID cards and permit validation and billing of existing cards pending a final decision in CC Docket 91-115 IS DENIED.

70. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 U.S.C. §§ and 1.419, supplemental comments as requested in paragraph 64 above SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before December 7, 1992. Reply Comments SHALL BE FILED as indicated above on or before January 6, 1993. To file formally in this proceeding, participants must file an

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[99] *See* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, *Notice of Proposed Rule Making*, 6 FCC Rcd 3506, 3509, paras. 24-25 (1991). CNS's application for review of the Bureau's rejection of its tariff for a similar offering is pending.

[100] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, *Second Report and Order*, CC Docket No. 91-35, 7 FCC Rcd 3251 (1992).

[101] We also note that a petition filed with the Commission on November 15, 1988, by National Telephone Services (NTS), proposes the establishment by AT&T of a through rate and an equitable division of the revenues with NTS for operator-assisted calls NTS transfers to AT&T at the NTS operator center, and for which AT&T has already established a through route connection. Petition for Order to Require American Telephone & Telegraph to Establish a Through Rate and Reasonable Division of Charges, File No. ENF-89-02. Parties responding to our questions in this proceeding may also include comments on the merits of NTS' proposal.

original and four copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with Downtown Copy Center, the Commission's duplicating contractor, at its office in Suite 640, 1990 M Street, N.W., Washington, D.C. 20554.

71. IT IS FURTHER ORDERED that the provisions in this Report and Order will be effective 30 days after FEDERAL REGISTER Publication.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

(Docket 92-77, Phase I
List of Parties Filing Comments and Replies

American Telephone & Telegraph Company (AT&T) ***

Advanced Telecommunications Corporation (ATC) ***

American Public Communications Council (APCC) ***

Ameritech Operating Companies (Ameritech) *

Bell Atlantic Telephone Company (Bell Atlantic) *

BellSouth Telecommunications, Inc. (BellSouth) ***

California Payphone Association (CPA) **

Capital Network System, Inc. (CNS) ***

Cleartel Communications, Inc. and Com Systems, Inc. (Cleartel/Com Systems) ***

Colorado Office of Consumer Counsel (Colorado OCC) **

Competitive Telecommunications Association (CompTel) ***

ComTel Computer Corporation (ComTel) ***

Consolidated Communications Operator Services, Inc. (CCOS) **

GTE Service Corporation (GTE) ***

International Telecharge, Inc. (ITI) ***

Intellicall, Inc. (Intellicall) **

LDDS Communications, Inc. (LDDS) *

MCI Telecommunications Corporation (MCI) ***

National Telephone Cooperative Association (NTCA) *

Northwest Pay Phone Association (NPPA) ***

NYCOM Information Service (NYCOM) **

New York Telephone Company and New England Telephone Company (NYNEX) ***

Public Utilities Commission of Ohio (PUCO) **

Pacific Bell & Nevada Bell (Pacific) ***

PhoneTel Technologies, Inc. (PhoneTel) ***

Pilgrim Telephone, Inc. (Pilgrim) *

Quest Communications Corporation (Quest) *

SDN Users Association Inc. (SDN Users) *

Southwestern Bell Telephone Company (SWBT) ***

Sprint Communications Company (Sprint) ***

TDS Telecommunications Corporation (TDS) **

U.S. Long Distance, Inc. (USLD) ***

US West Communications, Inc. (USWC) *

United States Telephone Association (USTA) *

Value Added Communications, Inc. (VAC) ***

WilTel Communications, Inc. (WilTel) **

Zero Plus Dialing, Inc. (ZPDI) ***

* Filed Comments only
** Filed Reply Comments only
*** Filed both Comments and Reply Comments

APPENDIX B

DOCKET 91-115
List of Parties Filing Comments and Replies

American Telephone & Telegraph Company (AT&T) ***

American Public Communications Council (APCC) ***

Ameritech Operating Companies (Ameritech) **

Bell Atlantic Telephone Company (Bell Atlantic) *

Capital Network System, Inc. (CNS) **

Central Atlantic Payphone Association *

Central Telephone Company (Centel) *

Competitive Telecommunications Association (CompTel) **

ComTel Computer Corporation (ComTel) *

Iowa Utilities Board (IUB) **

Integretel, Inc. (Integretel) *

Intellicall, Inc. (Intellicall) *

International Telecharge, Inc. (ITI) ***

MCI Telecommunications Corporation (MCI) *

Minnesota Department of Public Service (MDPS) *

NYCOM Information Services, Inc. (NYCOM) **

New York Telephone Company and New England Telephone Company (NYNEX) **

Pacific Bell & Nevada Bell (Pacific) *

Saco River Telegraph & Telephone Company (Saco River) **

Southwestern Bell Telephone Company (SWBT) ***

Sprint Corporation (Sprint) **

United Telecommunications, Inc. (United) *

Zero Plus Dialing, Inc.; OAN Services, Inc. and Resurgens Communications Group (Joint Commenters) *

* Filed Comments only

** Filed Reply Comments only

*** Filed both Comments and Reply Comments

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

Subject: In the Matter of Billed Party Preference for 0+ InterLata Calls (CC Docket No. 97-77, Phase I)

In resolving this issue, the Commission has taken particular care to avoid the classic problem of regulatory overkill: devising a solution that turns out to be worse than the problem we began with. After giving the 0+ public domain plan careful consideration, I must conclude that its adoption as an interim measure would only cause further confusion and impose further costs while producing no commensurate public policy gain. At the same time, the consumer education program and rulemaking porcess we establish today will assure that the parties most disadvantaged under the current system will be afforded a fair and effective interim solution to their immediate problems. I commend you and the Bureau for your constructive approach and I will monitor the development of both the consumer education program and the rulemaking with great interest.

STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: In the Matter of Billed Party Preference for 0+ InterLATA Calls, (CC Docket No. 92-77).

This Report and Order in Phase I of the Billed Party Preference (BPP) proceeding considers the need to take interim action in response to the alleged competitive inequities resulting from the use of AT&T proprietary calling cards with the 0+ form of access. I support this *Order* requiring AT&T to aggressively educate its CIID cardholders to check public payphone notices and to use 0+ access only at phones presubscribed to AT&T. They will also be required to provide clear and accurate access code dialing instructions on all of their proprietary cards. In addition, I support an investigation into the development of a compensation mechanism for OSP-handled AT&T proprietary card calls. I fully expect that this matter can be addressed in an expedited fashion. In reviewing the many proposed alternatives in this proceeding, I evaluated each of them in terms of their ability to reduce consumer confusion and inconvenience, respective costs, and the likeness of such a plan producing the desired results. In particular, I carefully evaluated the proposals that requested us to find "0+ in the public domain." However, upon careful examination of these plans, I agree that the Order correctly concludes that the costs of such a solution far outweigh potential benefits, and more importantly, I do not believe such proposals will best serve the interest of consumers. The aggressive education requirement that we have imposed on AT&T should go a long way toward correcting the alleged inequities. More importantly, I am confident that the on-going Billed Party Preference proceeding continues to offer the best long term solution.

Separate Statement of Commissioner Ervin S. Duggan

Re: Billed Party Preference for 0+ InterLATA Calls (CC Docket No. 92-77, Phase I).

The comments filed in response to the Commission's 0+ public domain notice identify a host of ills associated with the AT&T proprietary card and offer a wide range of solutions. The record, in essence, demonstrates four separate dangers posed by this proprietary card:

* Consumers using such proprietary cards are confused when their calls don't go through with 0+ or 10XXX dialing.

* AT&T's use of proprietary cards with 0+ dialing may have the effect of reducing competition in the public phone presubscription market.

* Only AT&T, as a practical matter, can market 0+ dialing with its proprietary cards.

* AT&T's proprietary card may allow AT&T and the Bell Operating Companies to divide the operator services market between them.

In April, the Commission asked for comment on two separate proposals, which are commonly called "billed party preference" and "0+ public domain." Billed party preference is a plan that would allow consumers to dial "0" from any telephone and be automatically routed to their preselected interexchange carrier, which could be any interexchange carrier. Billed party preference would seem to solve most, if not all, of the problems in the operator services market. We have not yet completed our consideration of the record on billed party preference, however, and there is substantial dispute in that record about its merits. If we do order billed party preference, it will be years before it will be implemented. We therefore asked for expedited comment on a second proposal--- 0+ in the public domain. Under that approach, AT&T would have the choice of using proprietary access methods for its proprietary cards, as its competitors do, or opening its database to allow competing operator services providers to validate its proprietary cards.

In this phase of the proceeding, we consider what to do in the interim before we decide on billed party preference. Some of the solutions proposed by the parties are in the public interest, and we adopt them now. We require AT&T, for example, to educate its customers thoroughly about how to use its proprietary cards. Second, we require AT&T, as a means of reducing consumer frustration, to make its 800 access number (required in an earlier order) to be easy for consumers to use in gaining access to

AT&T's network. Finally, we will launch a rulemaking to encourage compensation for other operator services providers when they handle 0+ proprietary card calls.

Certain other solutions have been proposed, including the immediate implementation of a 0+ public domain proposal. Since my preferred destination for public policy is some form of billed party preference, however, I join my colleagues in concluding that these transitional proposals should not be adopted today. However, if billed party preference proves infeasible, then we must reach some other permanent solution for the persistent problems that parties have identified in the operator services market. These alternate long-term solutions could include requiring AT&T to validate its proprietary cards for all IXCs (perhaps subject to a rate cap); prohibiting payments of commissions on proprietary card calls; and invalidating the LEC/AT&T mutual honoring agreements.

The measures we adopt today, however, will help ease some of the problems associated with AT&T's use of proprietary cards.

First, our order will help consumers who are confused when their calls don't go through with 0+ or 10XXX dialing. AT&T has instructed its proprietary card holders to dial 0+ first, and if they don't hear "AT&T," to hang up and try 10288. Many times, the instructions do not clearly offer AT&T's 800 number as a third option if 10288 is blocked (which is still the case at many locations). Moreover, AT&T's 800 number is often labelled a "customer service number," which may not suggest to the consumer that it can be used as a means of access to AT&T's network. Because AT&T's dialing instructions may confuse customers, we today require that it launch a vigorous program of consumer education and to make it clear that the required AT&T 800 access number will be rightly understood as a means of access.

Today's measures should also ameliorate the effect on competition of AT&T's use of proprietary cards with 0+ dialing in the public phone presubscription market. Because non-AT&T providers of operator services cannot complete calls made with proprietary cards, they cannot pay commissions to the premises owners for such calls, while AT&T can. Because of AT&T's large share of the calling card market, and because of the large number of calls billed to its proprietary cards, AT&T can pay higher commissions to premises owners while paying far less per call, and are thus better able to compete for those contracts. Confused and frustrated customers, moreover, often complain to premises owners (particularly in the hospitality industry) when they have difficulty using their proprietary cards. Premises owners are thus given an incentive to go back to AT&T, even though the competing operator services provider may be faultless. The measures we take today should substantially reduce these competitive problems as well. Customer education by AT&T will reduce misdirected proprietary card calls, and the further rulemaking will make compensation possible for OSPs that handle calls for users of proprietary cards.

Two other problems are not directly addressed in our action today because there do not appear to be satisfactory short range solutions. First, only AT&T, as a practical matter, can market 0+ dialing with its proprietary cards. Its competitors must use access codes, just as they did before equal access gave all long-distance companies the ability to market 1+ dialing. Second, AT&T's proprietary card effectively allows AT&T and the BOCs to divide the operator services market between them, because all intra-LATA calls on those cards are automatically routed to the BOC.

Like its 1+ calling advantage, AT&T's advantage in 0+ dialing is largely the result of its historic monopoly over operator services. We may need to address this vestigial remnant of monopoly if we want a truly competitive operator services industry, just as we have done in the 1+ and 800 service markets. There is much that appeals to me in the 0+ public domain proposal, particularly with the rate cap suggested by a coalition of competitive interexchange companies. But AT&T has vowed to resort to proprietary access rather than open up its databases— a move which, for technical reasons, would require 800 dialing at least in the short run. Roughly 25 million AT&T proprietary card customers would thus be forced to dial an 800 number for every call. Such a level of customer inconvenience and confusion would be difficult for the Commission to justify if our hope is to move as soon as possible to a system of billed party preference.

As a long term solution, billed party preference has great appeal as a pro-competitive, consumer-friendly solution. Billed party preference is, in fact, the 0+ counterpart of equal access in the 1+ market. If the record shows, however, that billed party preference is unwise or infeasible, then we must consider other permanent solutions to the structural competitive problems in this market.

# # # #

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-95

In the Matter of

AT&T COMMUNICATIONS	Transmittal Nos. 3380, 3537, 3542, and 3543

Revisions to Tariff
F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1992; Released: June 2, 1992

By the Commission: Commissioner Duggan dissenting and issuing a separate statement.

I. INTRODUCTION

1. This Memorandum Opinion and Order sets forth the Commission's conclusions with respect to issues designated in the investigation of AT&T Communications' (AT&T) Transmittal Nos. 3380, 3537, 3542 and 3543.[1] The transmittals introduce tariff revisions to four AT&T optional calling plans (OCPs), which would limit availability of existing rate discounts under the OCPs to calls made with AT&T's new Card Issuer Identifier (CIID) calling cards, thus withdrawing existing discounts for calls made with other cards specified in the tariff.[2]

2. Based on our review of the record, the Commission concludes that AT&T's proposed tariff revisions do not violate the prohibition against unreasonable discrimination contained in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), and are therefore lawful. The proposed tariff revisions affect existing AT&T OCPs which, pursuant to the requirements of our OCP Guidelines,[3] are generally available to all customers. The dispositive fact is that AT&T's new CIID calling cards, and thus the OCP rates associated with those cards, are fully and freely available to any interested customer. No unreasonable discrimination against any customer will result from the proposed tariff revisions, because any customer can obtain the discount rates merely by choosing to accept and to use the new AT&T CIID card.

II. BACKGROUND

3. Between August 16, 1991 and October 11, 1991, AT&T filed with the Commission tariff revisions which changed the card discounts on four of its OCPs to limit the availability of the discounts to calls charged to AT&T's new proprietary calling cards in the CIID numbering format.[4] Currently, the tariff applies a calling card discount to all "Calling Card" usage (including, for example, LEC cards).[5]

4. AT&T stated that it was withdrawing the OCP discounts from calls made with other cards as a result of its change-over to a new system for processing credit card calls that was scheduled to occur on January 1, 1992. The change-over coincided with the expiration of AT&T's Shared Network Facilities Agreements (SNFAs) with the Bell Operating Companies (BOCs), which covered the post-divestiture sharing of the unified Bell System's calling card facilities. AT&T said that the expiration of these SNFAs required AT&T to redesign its entire process of handling a message billed to a calling card.[6]

5. AT&T then asserted that: (1) contractual arrangements with the LECs deprived AT&T of the ability to extend OCP pricing automatically to non-AT&T CIID other card usage; and (2) technical and operational characteristics of its proprietary card call processing system also required such limitations.[7] According to AT&T, under the new separate AT&T and LEC card systems, the essential billing information needed for OCP pricing cannot be collected at the right place or time to apply the discounts to LEC card calls.[8]

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[1] AT&T Communications Revisions to Tariff No. 1, Transmittal Nos. 3380, 3537, 3542, and 3543, DA 91-1583, 7 FCC Rcd 156 (Com.Car.Bur. 1991), Erratum, DA 91-1591, 7 FCC Rcd 432 (Com.Car.Bur.) (1991) (*Investigation Order*).

[2] AT&T Tariff F.C.C. No. 1, Sec. 2.8.3.B.3, defines the "AT&T CIID/891 Card" as: an AT&T Calling card which contains a billing number issued to AT&T in the Card Issuer Identifier (CIID) or "891" international format. The CIID card number consists of a 10 digit account number and 4 digit personal identification number (PIN). The 10 digit account number is composed of a Bell Communications Research, Inc. (Bellcore) assigned 6 digit code which identifies AT&T as the card issuer, combined with a 4 digit code assigned by AT&T. The card numbering format is not based on a telephone line number. The tariff defines "Calling Card other than the AT&T CIID/891 Card" as including, for example, AT&T calling cards which are not in the CIID/891 format, other interexchange carrier (IXC) and local exchange carrier (LEC) calling cards, and commercial credit and charge cards. For ease of discussion, we will use the term "AT&T CIID" to refer to the AT&T CIID/891 card as defined in the tariff and "other card" to refer to those specified in the sentence preceding this.

[3] *In the Matter of Guidelines for Dominant Carriers; MTS Rates and Rate Structure Plans*, 59 RR2d 71 (1985).

[4] Transmittal No. 3380, filed on August 16, 1991, related to AT&T's Block-of-Time (Reach Out America) OCP. Transmittal 3357, filed on October 10, 1991, related to AT&T's Pro WATS OCP. Transmittals 3542 and 3543, filed on October, 11, 1991, related, respectively, to AT&T's Small Business OCP and its Plan D Service.

[5] For example, AT&T's Reach Out America (Block-of-Time) calling plan states: "The card option . . . include[s] in the calling plan all card calls (except Person-to-Person) made during the Night/Weekend rate period and billed to the Customer's Main Billed Account." AT&T Tariff F.C.C. No. 1, Sec. 3.2.1.I.1.

[6] *Investigation Order* at para. 5.

[7] *Id.* at para. 8. The justification regarding the contractual arrangements was contained in AT&T's Reply to MCI's petition to reject Transmittal No. 3380. *Id.* at para. 4. The technical and operational justification was contained in supplemental information AT&T provided the Tariff Division in response to both formal and informal staff requests. *See id.* at paras. 5-6.

[8] *Id.* at para. 6.

6. On December 19, 1991, the Common Carrier Bureau suspended for five months the transmittals limiting the OCP card discounts and instituted an investigation of their lawfulness. AT&T was ordered to file a direct case responding to specific questions propounded in the *Investigation Order*. The specific questions related to AT&T's claims that it would not be feasible to include usage charged to LEC cards in a post-SNFA environment. In addition, AT&T was invited to offer other justifications for the price disparity.[9]

III. PLEADINGS

7. On January 30, 1992, AT&T filed its direct case in response to the *Investigation Order*. Oppositions to or comments on the direct case were filed on February 27, 1992 by American Public Communications Council (APCC), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telecommunications, Inc. (BellSouth), Competitive Telecommunications Association (CompTel), International Telecharge, Inc. (ITI), New York Clearing House Association and Visa, U.S.A., Inc. (VISA), Nycom Information Services (Nycom), NYNEX Telephone Companies (NYNEX), Southwestern Bell Telephone Company (SWBT) and Whidbey Telephone Company (Whidbey). AT&T filed its rebuttal on March 12, 1992.

A. AT&T's Direct Case

1. Rates Which Comply with the OCP Guidelines Cannot Be Discriminatory

8. In its direct case, AT&T states that its transmittals could not violate Section 202(a) of the Act because they affect existing AT&T OCPs which, pursuant to the requirements of the Commission's OCP Guidelines, are generally available to all customers.[10] AT&T argues further that there is no discrimination as long as rates are made available to all customers who are ready, willing, and able to purchase the particular service.[11] Thus, according to AT&T, no discrimination against any customer will result from the tariff revisions because a customer can obtain the rates by ordering an AT&T CIID card which AT&T will supply upon request. AT&T says it already has supplied AT&T CIID cards to most customers of AT&T's OCPs. AT&T maintains that the transmittals are fully consistent with the Commission's OCP Guidelines and thus cannot be discriminatory under the Communications Act. AT&T argues that the dispositive fact is that AT&T's new calling cards, and thus the OCP rates associated with those cards, are fully and freely available to any interested customer.[12]

2. Any Discrimination Found To Exist Is Reasonable in the Circumstances

9. Even if there were a basis to find discrimination, AT&T argues, the rates at issue are demonstrably reasonable in the circumstances, and thus do not violate Section 202(a).[13] To support this assertion, AT&T claims the expiration of the SNFAs covering billing and validation systems used for both AT&T and LEC telephone line based and special billing number calling cards compel the tariff changes in the suspended transmittals. AT&T explains that under these shared systems, AT&T and the LECs each issued cards bearing the same numbers and honored each other's calling cards for both intraLATA and interLATA calls.[14] AT&T calls billed to either LEC or AT&T cards could be easily aggregated with other necessary information when a customer's bill was prepared, facilitating inclusion of AT&T calls charged to LEC calling cards in AT&T's OCPs.[15]

10. AT&T claims that separating the AT&T and LEC calling card systems required AT&T and the LECs to negotiate new contractual arrangements if they were to continue to offer their customers the convenience of using either a LEC or an AT&T card for both local and long distance calling. AT&T also stated that concern about its loss of ability to reject unilaterally calls charged to a LEC card number that had been involved in fraud on the AT&T, but not the LEC, network led AT&T to the conclusion that the card issuer should assume administrative and financial responsibility for calls charged to its cards. AT&T decided that both objectives could be achieved through execution of Mutual Honoring Agreements, or MHAs, with the LECs. AT&T states that it has executed approximated 1100 MHAs with individual LECs.[16]

11. According to AT&T, the MHAs make the card issuer, rather than the call carrier, take administrative responsibility for calls charged to its card.[17] AT&T states that this is the only way that mutual honoring could occur without requiring AT&T and a LEC to share customer account information about each other's cardholders.[18] To implement these changes in financial responsibility, AT&T explains, the MHAs change the routing of billing information. According to AT&T, when a LEC assembles and renders its bill to the customer, the charges for AT&T calls charged to the LEC card will appear on the LEC portion of the bill, completely separate from other AT&T messages. AT&T claims that this separation means that information needed to calculate the AT&T OCP discounts for these calls is lacking and thus they cannot be included in the AT&T OCP discounts.[19]

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[9] *Id.* at para. 11.

[10] AT&T Direct Case at 14, *citing In the Matter of Guidelines for Dominant Carriers; MTS Rates and Rate Structure Plans*, 59 RR2d 71 (1985) (*OCP Guidelines Order*).

[11] *Id.* at 14 n.**, *citing MCI Telecommunications Corporation v. FCC*, 917 F.2d 30 (D.C.Cir. 1990); *Sea-Land Services, Inc. v. ICC*, 738 F.2d 1311, 1316 (D.C. Cir. 1984).

[12] *Id.* at 14-15.

[13] *Id.* at 16.

[14] *Id.* at 2.

[15] *Id.* at 7.

[16] *Id.* at 16-17. Although AT&T drafted the basic model MHA, negotiations with the LECs led to "quite similar, but not uniform" agreements. *Id.*, Attachment B at 1-2. AT&T annexed a redacted version of the basic model MHA as Appendix I, and provided a complete version but requested confidential treatment for the latter. At the Bureau's request, AT&T also submitted copies of its MHAs with each of the BOCs and the GTE Telephone Operating Companies, also seeking confidential treatment for these submissions.

[17] Most of the MHAs do this by requiring the card issuer to purchase the accounts receivable for calls charged to its cards. AT&T Direct Case at 16-17, n.1.

[18] Attachment B at 5-6.

[19] AT&T Direct Case at 17. AT&T explains that calculating OCP card discounts on calls charged to LEC cards requires combining card usage information with information on many, if not all, of the customer's other calls. AT&T states that because the MHAs require the parties' systems automatically to separate AT&T calls charged to LEC cards from other AT&T calling records, the former calls cannot be rated with the OCP discount. *Id.* at 18.

12. AT&T asserts that making changes to permit it to include LEC calls in its OCPs would be unreasonably costly and burdensome. It notes that interim procedures required to enable it to offer OCP discounts to calls charged to LEC cards during the suspension period have been costly and burdensome to it and cannot be sustained for any substantial period of time.[20] AT&T states that because the cost of eliminating the rate difference is great and only an extremely small group of customers would benefit from its elimination, the OCP rate differences should be considered reasonable, and thus lawful, under Section202(a) of the Act.[21]

B. Opposition to AT&T's Direct Case

13. Every party filing in response to AT&T's direct case challenges AT&T's factual and legal justifications for the rate disparity that the tariff revisions would create.

1. The Tariff Revisions Create Rate Discrimination

14. Several Commenting parties challenge AT&T's legal argument that the "dispositive fact" with respect to the existence of discrimination is that its CIID cards, and thus the OCP rates associated with them, are available to all to all customers on the same terms and conditions. SWBT states that the proposed tariff revisions would create a discrimination because customers will not be able to continue to use their familiar telephone line number cards, whether issued by AT&T or a BOC, and still receive AT&T OCP discounts.[22] NYNEX claims that the OCP Guidelines, with which, AT&T asserts, its transmittals comply, merely established standards for determining the reasonableness of OCP rates, not the terms and conditions under which those rates are made available to customers. It adds that unlike the AT&T OCP that the Commission found to be discriminatory in the *MCI OCP* proceeding,[23] the discount for AT&T CIID cards would not be customer neutral, but would be available to only particular customers. Moreover, NYNEX asserts, there is no rational basis for limiting calling card discounts to calls made with an AT&T CIID card.[24]

15. BellSouth argues that in *American Trucking Association, Inc. v. FCC*,[25] the court unequivocally rejected AT&T's general availability argument. It concludes that AT&T failed to show that it is equitable to charge different rates for concededly identical common carrier services based solely upon the calling card billing option chosen by the customer.[26] Several parties add that *MCI Telecommunications* and *Sea-Land Service, Inc.* do not preclude a finding of discrimination because these cases hold merely that the use of contract rates is not *per se* unlawful, if equivalent rates are made generally available to similarly situated parties willing and able to meet the contract terms.[27]

16. ITI asserts that whether rates are generally available to similarly situated customers is simply a threshold question; the Commission must still conduct a three part inquiry into 1) whether the two services are "like"; 2) if so, whether there is a price difference; and 3) if there is a difference, whether it is reasonable.[28] VISA states that the service provided to AT&T CIID cardholders is long distance telephone service billed to a calling or credit card, a service identical to that being provided to non-AT&T cardholders and differing only in the rate charged, a factor not considered in determining whether services are "like."[29] It adds that with likeness and price disparity established, AT&T must justify the price disparity as reasonable.

2. The Rate Discrimination is Unreasonable

17. Virtually every party commenting on AT&T's direct case argues that the tariff revisions would create unreasonable discrimination. For example, NYCOM maintains the revisions would unfairly penalize any customers who retain their LEC cards, but still use AT&T and an AT&T OCP for long distance service by charging those customers a higher rate for like services.[30] Whidbey argues that AT&T's dominance in the interstate MTS market, especially in service areas like Whidbey's, where AT&T is the sole provider of interstate interLATA MTS and WATS service, distinguishes the discrimination created by AT&T's OCP limitations from any contained in other IXC tariffs. Whidbey compares the AT&T tariff revisions to tying arrangements proscribed under antitrust law.[31] VISA argues that the tariff revisions discriminate unreasonably against customers who bill calls to non-AT&T commercial credit cards.[32]

18. ITI and CompTel state that because AT&T and the LECs previously shared customer account information needed to apply the OCP discounts to all card usage, the discrimination could have been avoided if AT&T had chosen to modify its business decision. They urge that if AT&T and the LECs will not voluntarily modify the MHAs to eliminate the terms causing the discrimination, the Commission should act under Section 211 to require these carriers to do so.[33] APCC adds that because AT&T failed to explain why its business decision in response to termination of the SNFAs legitimizes the discrimination arising under its new systems, the Commission must conclude that AT&T has unnecessarily adopted a system that arbitrarily excludes holders of line-number based AT&T or LEC issued cards from receiving the OCP discount.[34]

19. Bell Atlantic, BellSouth and NYNEX assert that the anticipated expiration of the SNFAs governing shared calling card validation facilities do not compel AT&T to limit OCP pricing discounts to AT&T CIID cards.[35] Bell Atlantic says that expiration of the SNFAs means only that in order to validate a Bell Atlantic calling card, AT&T will send an

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[20] *Id.* AT&T claims that its temporary procedures for smaller ICOs cost approximated $1 million to establish and service only about 10, 000 customers. *Id.* , Attachment C at 1.

[21] *Id.* at 18.

[22] SWBT Opposition at 2.

[23] *MCI Telecommunications*, 104 FCC 2d 1383 (1986).

[24] NYNEX Comments at 2-4 & n.9.

[25] 377 F. 2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

[26] BellSouth Opposition at 5-6.

[27] *See, e.g.*, BellSouth Opposition at 5; CompTel Opposition at 3-4; ITI Opposition at 5-6.

[28] ITI Opposition at 6, citing *MCI*, 917 F. 2d at 39.

[29] VISA Opposition at 5-6.

[30] NYCOM Opposition at 8-9.

[31] Whidbey Opposition at 5-7.

[32] VISA Opposition at 2-4.

[33] ITI Opposition at 10-11; CompTel Opposition at 6; *accord* SWBT Comments at 2-6; Whidbey Opposition at 12-13.

[34] APCC Comments at 4-5.

[35] BellSouth Opposition at 2-4; Bell Atlantic Response at 2-3; NYNEX Comments at 4-5.

inquiry to Bell Atlantic's line information database (LIDB) instead of to the previously shared system. These inquiries, Bell Atlantic continues, merely tell AT&T whether the calling card number is valid; neither AT&T nor Bell Atlantic use them to determine whether a discount applies to rate the call or to render the bill.[36] BellSouth adds that, while mandating separate validation databases, the Plan of Reorganization, or POR, left the parties considerable discretion to develop their own policies for calling card issuance, billing and collection. BellSouth states that policy choices, not POR requirements, impelled AT&T's decision to withdraw OCP discounts for messages charged to LEC-issued calling cards.[37]

20. NYNEX states that it has no contractual arrangement that prevents AT&T from continuing to apply OCP discounts to calls made with a NYNEX company card. It explains that AT&T has tried to condition its continued acceptance of LEC cards on their executing MHAs, the terms of which could make it technically infeasible to continue to apply OCP discounts to LEC card calls when customer bills are calculated. NYNEX adds that nothing prevents AT&T and a LEC from modifying an MHA to allow AT&T to continue to apply OCP discounts to calls made with a LEC card. NYNEX asserts that it already has incentives to minimize fraudulent use of its cards because it receives substantial intraLATA revenues from calling card calls and because its card is accepted by all major IXCs, who would discontinue this practice if NYNEX did not keep fraud to a minimum.[38]

21. BellSouth concedes that to the extent an MHA requires a card issuer to purchase accounts receivable associated with calls charged to its cards, this makes it "infeasible" for calls charged to LEC cards to be included in AT&T's OCP because AT&T services charged to that card are recorded as BOC revenue and segregated from CIID billing, which is recorded as revenue due AT&T. This separate accounting treatment would make uniform application of OCP discounts to both message types extremely cumbersome. BellSouth notes, however, that nothing prevents the use of an MHA with different accounting provisions. It states that its MHA with AT&T calls for AT&T to record and rate LEC line number calling card messages and to transmit these, as well as CIID card message data, to BellSouth for billing.[39] BellSouth then calculates any applicable OCP discount and sends the customer a consolidated bill. All qualifying card calls receive the discount and all are identified as AT&T services on the AT&T part of the customer bill. BellSouth states that the cost of the system and operations changes needed to create this billing process, which it assumed, were not substantial. It adds that its MHA also contains terms that still effectively limit IXC exposure on fraud and uncollectibles.[40]

C. AT&T Reply

22. AT&T characterizes the transmittals' opponents as competitors whose arguments reflect only their self interests.[41] AT&T maintains that requiring it to offer OCP discounts to calls charged to LEC cards would only boost the LECs' non-tariffed billing services at the cost of reduced competition in the interexchange services market. AT&T argues that the Communications Act does not compel it to offer an already generally available rate through multiple optional billing vehicles.[42] In response to VISA's discrimination argument, AT&T notes that the number on the AT&T Universal Card cannot be used in connection with OCP discounts. It explains that none of its new calling card systems interacts with the systems that support the commercial credit card number on the AT&T Universal Card.[43]

23. Finally AT&T reiterates that it acted reasonably in deciding to issue and accept its new calling cards, and that these decisions permit it to offer its customers additional options that will enhance competition for interexchange services. AT&T says it based its decisions on non-discriminatory commercial charge card practices and financial principles necessary to control fraud and uncollectible expenses. In addition AT&T notes, none of its customers have objected to these tariff revisions, and any who fail to use the AT&T CIID card and so forego the OCP discounts on any particular call do so by their own choice, not AT&T's. AT&T maintains that such a choice cannot constitute discrimination under Section 202(a).[44]

IV. DISCUSSION

A. Discrimination Analysis

24. Section 202(a) of the Communications Act prohibits unjust or unreasonable discrimination in the provision of "like" services. To determine whether an offering complies with the carrier's duty to refrain from unreasonable discrimination in the provision of "like" services, the Commission engages in a three-step inquiry. Specifically, the Commission must determine: (1) whether the services are "like"; (2) if so, whether there is a price difference; and (3) if so, whether the price difference is reasonable.[45] If two services are "like," the burden rests with the carrier to demonstrate that any disparity in the pricing of the two services is reasonable.[46]

B. Application of Discrimination Analysis to AT&T's Offerings

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[36] Bell Atlantic Response at 2-3; *accord* BellSouth Opposition at 3-4.

[37] BellSouth Opposition at 4.

[38] NYNEX Comments at 5-6, n.12; *accord* Whidbey Opposition at 9-12.

[39] BellSouth Opposition at 7-8. In *ex parte* discussions with Bureau staff, AT&T confirmed that Pacific Bell and US West Communications also executed MHAs with provisions like that of BellSouth's. *See* Letter from R.L. Buchwalter, AT&T, to Ms. D. Searcy, Mar, 30, 1992, Re: *Ex Parte* Meeting in [sic] Docket 91-1583.

[40] BellSouth Opposition at 8.0

[41] AT&T Rebuttal at ii.

[42] *Id.* at 7-9, 10 n.***.

[43] *Id.* at 11 n.*.

[44] *Id.* at 14-15 n.*, citing *MCI*, 104 FCC 2d at 1394.

[45] *See, e.g., MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) (*Tariff 12 Decision*).

[46] *See, e.g.*, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, 4935 (*Tariff 12 Order*) , *recon. denied*, 4 FCC Rcd 7928 (1989).

1. Like Services and Price Discrimination

25. There is no dispute over the "likeness" of the service at issue: MTS service charged to a calling card. Under the current tariff, OCP customers who charge this MTS service to a LEC card or an AT&T CIID card will receive the card discount applicable to their particular plan.[47] Under AT&T's tariff revisions, only OCP customers who charge this MTS service to an AT&T CIID card receive the discount; OCP customers who charge this MTS service to another card that AT&T accepts will not receive the discount.

26. We conclude that the services are "like" and that there is a price difference. The burden therefore rests with AT&T to show that the discrimination in pricing is reasonable.[48]

2. Reasonableness of the Discrimination

27. Upon review of the record produced in this investigation, we find that the Common Carrier Bureau, in making its finding that the revisions raised serious questions of compliance with Section 202(a), focused almost entirely on the factual justifications for the reasonableness of the discrimination proffered by AT&T. The impact of the general availability of the AT&T CIID card, and the consequent factor of consumer choice, on the issue of the reasonableness of the discrimination was not considered. We will first address the question of whether the price discrimination established by the tariff revisions at issue is reasonable because AT&T is making the AT&T CIID card, and thus the OCP rates associated with its use, generally available to similarly situated customers, and then we will turn to the factual issues designated in the *Investigation Order*.

28. a) *General Availability* -- AT&T contends, in essence, that this transmittal presents no question of discrimination because any OCP customer can obtain a CIID card and, therefore, AT&T will not be charging different rates to different classes of customers. We are not persuaded by AT&T's argument insofar as it disputes whether the tariff revisions will introduce discrimination. However, the Act prohibits only unreasonable discrimination. Thus, our rejection of AT&T's argument does not end our inquiry. Rather, we must consider whether the price difference for MTS service introduced by the tariff revisions is reasonable. We conclude that the general availability of the AT&T CIID card renders the price discrimination created by the tariff revisions reasonable, because customer choice, rather than a carrier-imposed barrier, controls the availability of the discounted rate.

29. It is true that different OCP customers will prefer different cards,[49] and those customers preferences will create distinct classes of lcustomers. However, it is the customer, not AT&T, who will determine which class to join. In this particular case, there are no unreasonable obstacles preventing customer choice and no qualifying criteria to unreasonably limit those customers eligible for AT&T's CIID card. Rather, the revisions simply create two different prices for MTS service but, in our view, it is not an unreasonably discriminatory price difference because the customer selects which price to pay by using the AT&T CIID card, which AT&T will provide freely.[50]

30. We believe a key question in determining whether unreasonable discrimination exists is whether OCP customers who choose to use a CIID card and those who choose to use another card are similarly situated. We conclude that they are not. Some OCP customers will chose to charge their calls to a line number-based card (whether issued by AT&T or the LECs), and that customer choice will render them "unwilling" to meet the terms of the OCP tariffs, as revised by the transmittals under investigation. If, as is the case for these tariff revisions, there are no carrier-imposed barriers to meeting those terms and conditions and, indeed, the carrier is actively facilitating compliance with those terms and conditions (by issuing CIID cards to any customers who could use them) any unwillingness on the part of customers to avail themselves of the OCP rates is the result of the customers' choice, not AT&T's.[51] Thus, we conclude that any customers choosing

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[47] Under Reach Out, for example, the customer chooses to pay a monthly charge to obtain a cumulative total amount of calling time per month for dial station calls during the Night/Weekend rate period. If more than the chosen amount of calling time is used, the additional time will be totalled and rated using a discounted per-minute rate. Recurring charges under Reach Out consist of a monthly charge and per minute charge for periods over the basic block of time; the monthly charge applies regardless of whether the customer makes any calls and the per minute charge applies to all calls in excess of the initial block which are made during the Night/Weekend period. Two additional options involving card usage may be obtained for an additional monthly charge. Both card options waive the service charges normally associated with calling card calls ($.80 per call) made during the Night/Weekend rate period. This represents an extra discount above the basic block-of-time discount. In the case of Reach Out, Transmittal 3380 would limit the card options to include only those calls charged to an AT&T CIID credit card. *See* AT&T Tariff F.C.C. No. 1, Sec. 3.2.1.I.1. The result for Reach Out customers who choose to use any other card is that (1) those card calls will no longer count toward filling the initial 30 or 60 minute block-of-time purchased; (2) they will no longer receive a discounted per minute rate for usage beyond the initial block for such calls; and (3) they will now pay the $0.80 service charge normally associated with card calls whenever they use a card other than the AT&T CIID card.

[48] *See, e.g., Tariff 12 Order*, 4 FCC Rcd at 4935.

[49] Some customers will prefer cards that incorporate a local telephone number because it is easier to remember. Some customers will prefer a LEC card since any interexchange carrier can validate the card. This feature permits customers to place 0+ calls at virtually any payphone or other aggregator location, regardless of whether that location is presubscribed to AT&T. Other customers will prefer an AT&T CIID card because AT&T will not permit other long distance carriers access to the data to validate the card and bill the call. For them, use of the AT&T CIIDcard will provide assurance that the customer will not receive a bill for the services of a carrier that the customer did not intend to use. We will address issues relating to IXC calling cards usable with 0+ dialing in CC Docket No. 92-77, which was established to consider the question of billed party preference and related matters. *See* Notice of Proposed Rule Making, CC Docket No. 92-77, released May 8, 1992.

[50] The transmittals under investigation do not change current practice with respect to AT&T's treatment of commercial credit or charge cards in its tariff. Therefore, we do not address the discrimination argument raised by VISA at this time because it is beyond the scope of the issues designated in the *Investigation Order*.

[51] We note that AT&T has been accused of engaging in questionable marketing practices with respect to its new CIID card, particularly the direction to AT&T customers to "destroy your old card" in the context of marketing literature discussing unspecified "government requirements" which prohibit AT&T

to use a calling card other than the AT&T CIID card are not similarly situated to those customers who choose to use the AT&T CIID card.

31. We recognize, as we said in the *MCI* OCP proceeding, that3"general availability of an offering alone cannot guarantee that it is lawful."[52] However, as in that case, we find merit in AT&T's argument that general availability and customer choice, in combination with compliance with the *OCP Guidelines Order*, supports a finding that these tariff revisions are not unreasonably discriminatory under Section 202(a). The Commission found, in the *MCI* OCP proceeding, that the Reach Out plan under scrutiny was not unreasonably discriminatory because the OCP rates were available to all customers, and thus receiving, or not, the lower rate "is their choice, not AT&T's," and the rates were otherwise in compliance with the OCP Guidelines.[53] The tariff revisions under investigation here are no different: the OCPs continue to comply with the OCP Guidelines and receipt of the OCP rate for card calls is within the control of the customer. If the customer wishes to have his or her card call included in an OCP, all that is required is use of the AT&T CIID card, which, in turn, is generally available to any interested customer.

32. Accordingly, we conclude that no unreasonable discrimination cognizable under Section 202(a) is introduced by AT&T's proposed tariff revisions.[54] We emphasize that this finding is specific to the facts of this inquiry. The extent to which future AT&T price revisions may similarly be found as not unreasonably discriminatory must be resolved on a case-by-case basis with full consideration of the potential restrictions on customer choice.

33. b) *Other Justifications* – AT&T, in its direct case, relies primarily upon contractual and technical limitations to justify the discrimination. AT&T also maintains that any discrimination is reasonable because AT&T wanted to offer a calling card with special features, its competitors offer similar calling card features, and the costs of remedying the discrimination "dwarf" the potential benefit to a very small group of customers. Because AT&T's contractual and technical justifications were designated as issues in the *Investigation Order*, we will briefly address these justifications.

34. The record clearly shows that AT&T made what it termed a "policy decision" to limit the availability of discounts associated with its OCPs to AT&T CIID users.[55] The contractual arrangements and operational systems which followed reflect this decision.[56] In AT&T's words, they met its "marketing objectives."[57] To the extent that their operation would prevent AT&T from granting non-CIID card users OCP discounts, this effect was ultimately attributable to an AT&T marketing decision rather than any immutable technical or operational limitation. In light of our finding that the discrimination created by the transmittal would be reasonable, we need not address here whether there would be situations in which marketing objectives, for example, triggered by competitive conditions, could justify discriminatory rates. We find, however, that neither the contractual nor the technical limitations alleged by AT&T would *per se* justify the discrimination in rates proposed in the transmittal. The claim that tariffs of competitors contain similar provisions also does not provide an adequate justification. Uninvestigated tariff provisions of other carriers do not support an inference with respect to the lawfulness of this tariff. The assertion that the rate disparity will impact relatively few customers is also an inadequate justification for discrimination in rates. Section 202(a) prohibits any unjust or unreasonable discrimination in charges. It does not make exceptions for unreasonable discrimination against, or undue preferences that disadvantage, only a few customers.

V. CONCLUSION

35.The Commission has reviewed the tariff transmittals, the direct case, the supporting materials, the pleadings, and the comments filed in this docket. We find that the tariff revisions under investigation do not establish unreasonably discriminatory rates, terms and conditions of service. Any variation in rates charged to OCP customers under the

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from "sharing card numbers with your local telephone company." SWBT, for example, has claimed that these statements have led some customers to believe incorrectly that their SWBT cards will no longer be usable on the AT&T network, and that they should destroy their existing SWBT cards. *See* SWBT Comments at 8-9. AT&T has not attempted to rebut arguments aimed at its marketing practices, beyond arguing that such claims do not raise any issues cognizable under Section 202(a). *See* AT&T Rebuttal at 8 n.*. This issue is being investigated elsewhere by the Commission. By our action in this docket, we do not prejudge the outcome of those separate investigations, including any findings concerning the reasonableness of AT&T's practices or remedies for practices found to be unlawful.

[52] 104 FCC 2d at 1394 n.29 (citing *American Trucking Association v. FCC*, 377 F.2d 121 (D.C.Cir.), *cert. denied*, 386 U.S. 943 (1966)).

[53] 104 FCC 2d at 1394.

[54] We note also that no challenge has been brought as to the reasonableness of either the OCP rates which will be charged AT&T CIID card users, or the reasonableness of the basic MTS rates which will be charged users of other cards, under the tariff revisions. Again, where customer willingness or unwillingness to take and use the CIID card is the determining factor, and the card itself is generally available, the resulting rate differentials are not unlawful under Section 202(a) of the Act.

[55] *See* Bell Atlantic Response at 1-2 and attached letter from Russell D. Morgan, AT&T, to J. R. Weber, Bell Atlantic, dated December 18, 1989, at 1.

[56] The facts contradict AT&T's portrayal, in its direct case, of a monolithic contractual framework which deprives AT&T of the ability to include LEC cards in the OCPs. The actual MHA situation is neither uniform nor does it compel the rate discrimination which results from these tariff revisions. This is also true of the operational justification proffered: rather than the monolithic system changes which AT&T claims are responsible for the withdrawal of OCP pricing for cards other than AT&T CIID cards, it is evident from the record that at least some LECs appear to be technically and operationally capable of continuing to include LEC card usage in the calculation of charges pursuant to AT&T OCPs. Even among the LECs who have admitted that under their MHAs, inclusion of LEC card usage has been rendered operationally impractical in the near term, the record reveals a consensus that this situation can be rectified with relative ease and at reasonable cost. *See e.g.*, Bell Atlantic Response at 3-4. Moreover, the procedures creating this situation were insisted upon by AT&T, over the objections of some LECs.

[57] *See Investigation Order* at para. 6.

revisions result solely from customer choice, not AT&T's. We therefore conclude that the tariff revisions do not violate the statutory prohibition against unjust and unreasonable discrimination contained in Section 202(a) of the Communications Act and therefore we find them to be lawful.

VI. ORDERING CLAUSES9

36. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 202(a) and 204(a), of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 202(a) and 204(a), that the investigation of AT&T Communications, Tariff F.C.C. No. 1, Transmittal Nos. 3380, 3537, 3542, and 3543, IS TERMINATED, Transmittal Nos. 3380, 3537, 3542, and 3543 ARE LAWFUL.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Dissenting Statement
of
Commissioner Ervin S. Duggan

In Re: AT&T Communications, Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 3380, 3537, 3542, and 3543

In this order, the Commission concludes that it is reasonable for AT&T to deny calling-card discounts to its Reach-Out America customers when those customers bill the AT&T call to a local exchange telephone company (LEC) card rather than to an AT&T proprietary ("CIID") card. The effect of this decision is to deny to certain customers, simply because they have chosen one billing mechanism over another, a discount they once enjoyed for calling card calls. And AT&T has not demonstrated, nor even asserted, that it costs more to bill calls tc a LEC card than to an AT&T CIID card.

I am troubled by the Commission's decision today because it appears to allow discrimination without cost justification or other substantial justification. It allows this discrimination, moreover, in the market for operator services, a market in which the Commission faces significant unresolved questions about whether competition is sufficient.

The Communications Act in Section 202(a) prohibits carriers from engaging in unreasonable discrimination among customers of like services. In this case, the Commission has concluded that services billed to different calling cards are indeed "like" each other, and that the difference in prices charged by AT&T is indeed discriminatory. The sole remaining issue, then, is whether the discrimination is reasonable--- a major issue, since discriminatory price differences that are deemed unreasonable are unlawful. The burden of justifying discriminatory rates is on the carrier.

Discrimination may be justified as reasonable on various grounds--- on the basis of cost differences or on transitional grounds, for example.[1] But such justifications have not been

[1] See, e.g., National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095, 1136-37 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 1224 (1985); American Trucking Associations, Inc. v. FCC, 377 F.2d 121, 128 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967).

advanced here. And as the Commission recognizes, merely demonstrating that proprietary cards are "generally available" to all customers is not a sufficient justification for discrimination.[2] Instead, the Commission finds the discrimination here reasonable because customers can choose whether to use AT&T's proprietary card, and get the discount, or choose to use the line-based local exchange telephone company card, and be denied the discount.

In fact, the choice is a pressured one. Customers must give up the convenience of using a line-number-based card in order to qualify for the discount in question. The relative merits of the cards themselves should drive the decision about which card to use. But when the rates that attach to the cards are unrelated to the cost of billing to those cards, then competition among cards is potentially distorted. If, on the other hand, AT&T had shown that it cost more for it to bill calls to the line-based cards, then this would be a meritorious case, in my view. But AT&T has not asserted that there is any cost basis for this discrimination. And the Commission has rejected AT&T's argument that technical and operational factors require it to deny the discount to non-proprietary cardholders.

The reason that AT&T is offering discounts only to customers who use its card is understandable: it is attempting to impel as many customers as possible to use its proprietary cards. This is not an uncommon business practice in other, highly competitive, markets. But we have not yet determined that the operator services market is fully competitive. In fact, we recently issued a Notice looking into the effect of AT&T's use of proprietary cards on the competitiveness of that market. In particular, we raised questions about the effect of AT&T's use of such cards on the public phone presubscription market.[3]

The Commission's decision in today's order permitting AT&T to limit discounts to users of its proprietary cards will have another effect: it is likely to further impel premises owners to select AT&T as their presubscribed carrier for operator services. It strikes me as unwise, as well as premature, to allow AT&T to

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[2] Order at para. 31, citing MCI Telecommunications, 104 FCC 2d 1383, 1394 n. 29 (1986), and American Trucking Associations, Inc. v. FCC, 377 F.2d 121.

[3] Billed Party Preference for 0+ InterLATA Calls, Notice of Proposed Rulemaking, CC Docket No. 92-77, FCC 92-169, released May 8, 1992, at paras. 36-43.

provide discriminatory discounts on its proprietary cards while questions about that market remain unresolved.

Finally, I am concerned about the precedent that could be set by today's decision. The logic of this order implies that any carrier may discriminate among customers for any service, regardless of whether the market is fully competitive--- and without providing the substantial justification that the Commission has traditionally required before deeming discrimination lawful. Such a hands-off approach may make sense in the market for business services, which we have characterized as substantially competitive. But should we be equally tolerant with respect to markets that we have not yet determined to be substantially competitive, such as operator services? I have my doubts, and therefore must dissent.

# # # #

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Expanded Interconnection with Local Telephone Company Facilities	**CC Docket No. 91-141 Transport Phases I & II**
Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board	**CC Docket No. 80-286**

SECOND NOTICE OF PROPOSED RULEMAKING

Adopted: September 17, 1992; Released: October 16, 1992

Phase I
Comment Date: December 4, 1992
Reply Date: December 21, 1992

Phase II
Comment Date: December 21, 1992
Reply Date: January 22, 1993

Separations
Joint Board Comment Date: December 21, 1992
Joint Board Reply Date: January 22, 1993

By the Commission: Commissioners Marshall and Barrett issuing separate statements.

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I. INTRODUCTION

A. Summary

1. In the *Special Access Expanded Interconnection Order* adopted today,[1] we are ordering the Tier 1 local exchange carriers (LECs)[2] to provide expanded interconnection for interstate special access to all interested parties. In this Second Notice of Proposed Rulemaking, we take two further steps to remove additional barriers to the development of access competition. We propose: (1) expanded interconnection for the provision of switched transport; and (2) additional measures that would permit the development of competitive switched access networks.[3] These measures will greatly increase the scope of interstate access competition, moving the telecommunications industry closer to a fully competitive environment. We believe that increased access competition will produce major benefits, giving access customers a broader range of service options and increasing LEC incentives for efficiency and innovation. We also believe that these measures will foster the rapid deployment of new technologies.

2. In Phase I of this Notice, we propose to require that Tier 1 LECs offer expanded opportunities to interconnect with their switched access networks for the provision of interstate switched transport. Such expanded interconnection will enable Competitive Access Providers (CAPs) and other interconnectors to offer transmission between LEC central offices and interexchange carriers' (IXCs') points of presence (POPs), and thus to compete with transmission services now provided on a monopoly basis as part of the LECs' switched transport services. As with special access expanded interconnection, CAPs and other interconnectors would be able to physically (or virtually) collocate transmission equipment in LEC central offices to enable them to interconnect their circuits to the part of the LEC network needed to complete the service.[4] Under this proposal, CAPs and others could interconnect for the first time to LEC switches, subscriber lines, and portions of LEC switched transport.

3. In most respects, we propose to impose the same architecture requirements and interconnection standards for switched transport that we are adopting for special access expanded interconnection. We also propose to apply most of the rate structure and pricing decisions reached in the *Special Access Expanded Interconnection Order* and the *Transport Order* [5] to set the prices, terms, and conditions for switched transport expanded interconnection. These decisions, we believe, have already laid the essential groundwork for expanded interconnection for switched transport. We also invite comment on a limited number of other architecture, rate structure, pricing, and implementation matters associated with the introduction of switched transport expanded interconnection, as well as on measures to increase LEC pricing flexibility for switched transport.

4. In Phase II of this Notice, we propose broader measures designed to remove possible barriers to the development of competitive interstate switched access networks that would offer switching as well as transmission functions. WilTel, Inc. (WilTel), Teleport Communications Group (Teleport), Metropolitan Fiber Systems (MFS), and others have sought access to LEC functionalities they say that they need to compete with LEC tandem switching facilities. In particular, they have expressed interest in providing switching facilities that would perform functions similar to LEC access tandem switches. To perform such switching, it appears that interconnectors would need to receive from the LECs certain signalling and possibly other functionalities, in addition to the ability to interconnect their own circuits with LEC switched services. This broader form of switched access competition could open the door to a robust "network of networks," in which the switched networks of CAPs and others interconnect with, but also compete with, each others' as well as the LECs' switched access networks. We also refer issues concerning the separation of the costs of providing expanded interconnection to the Joint Board in CC Docket No. 80-286.[6]

B. Background

5. On May 9, 1991, we adopted a Notice of Proposed Rulemaking and Notice of Inquiry (*NOI*)[7] proposing expanded interconnection for the provisionx of interstate special access. We also sought additional information and comment before deciding whether to propose expanded interconnection for interstate switched transport. We stated that the potential benefits of expanded interconnection for switched transport are substantial because of the large size of that market, although it presented more complexities than special access. In particular, we sought comment on the compatibility of the current switched transport rate structure with a competitive market. Finally, we requested comment on the potential effects of switched transport competition on universal service, existing support flows, jurisdictional separations, and state regulatory policies.[8]

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[1] *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order, CC Docket No. 91-141, FCC 92-440 (adopted Sept. 17, 1992) (*Special Access Expanded Interconnection Order*).

[2] Tier 1 LECs are those with more than $100 million in annual regulated revenues for a sustained period of time. *Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs*, 5 FCC Rcd 1364, 1364 (1990) (defining Tier 1 LECs using the criteria used to define Class A companies in 47 C.F.R. §§ 32.11(a) & 32.11(e) (1991)).

[3] Dealing with these issues in two separate phases will permit the Commission to expedite action on the first set of issues, which are less complex than those involved with tandem competition.

[4] We anticipate that, in many cases, CAPs and others will use the same transmission and interconnection arrangements for both switched transport and special access expanded interconnection.

[5] *Transport Rate Structure and Pricing*, Report and Order, CC Docket No. 91-213, FCC 92-442 (adopted Sept. 17, 1992) (*Transport Order*).

[6] We ask the Joint Board to determine whether there is a need to revise the separations procedures to identify and allocate the costs of providing expanded interconnection in order to ensure a reasonable allocation of costs between the jurisdictions, and if so, to develop such recommendations. *See infra* ¶ ¶ 54-55.

[7] *Expanded Interconnection with Local Telephone Company Facilities*, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259 (1991).

[8] We subsequently adopted a Notice of Proposed Rulemaking in the *Transport* proceeding seeking comment on proposed changes in the LEC switched transport rate structure. *Transport Rate Structure and Pricing*, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341 (1991).

6. Sixty-six parties submitted comments and 62 parties filed reply comments on expanded interconnection issues associated with special access and switched transport.[9] A number of these parties, including the LECs, the larger CAPs, and some state commissions, addressed switched transport expanded interconnection issues.

7. The *Special Access Expanded Interconnection Order* requires Tier 1 LECs to offer expanded interconnection for the provision of interstate special access service through physical collocation whenever requested by interconnectors, subject to certain limited exceptions. We require that expanded interconnection be available to all third parties, including CAPs, IXCs, and end users. We also establish rate structure and pricing rules for connection charges designed to compensate the LECs for services related to expanded interconnection. We also conclude that, rather than establishing a contribution charge to recover the over-allocation of general support facilities (GSF) investment to the special access category, we should amend our rules to eliminate this over-assignment. However, we permit LECs to seek future approval of a contribution charge to recover any other specifically identified regulatory support flows or cost misallocations now recovered through LEC rates for special access services subject to competition. Finally, we are granting the LECs increased pricing flexibility to respond to competition for special access services.

8. In the *Transport Order*, we are establishing interim transport rate structure and pricing rules that will be effective for two years, starting in November, 1993. The interim rate structure includes four elements: an entrance facilities charge for transport from the IXC POP to the serving wire center (SWC); a direct-trunked transport element for transport from the SWC to an end office without tandem switching; a tandem-switched transport element for SWC-to-end office transport using tandem switching, including separate charges for interoffice transmission and tandem use; and an interconnection charge. The flat rates for entrance facilities and direct-trunked transport will be based on equivalent voice grade, DS1, and DS3 special access rates, and will be presumed reasonable if the rates paid by customers taking direct-trunked transport are consistent with a benchmark DS3-to-DS1 ratio of at least 9.6 to 1.[10] The usage-based rates for the interoffice transmission element of tandem-switched transport will be presumed lawful if they are set at a per-minute equivalent of direct-trunked transport rates, using a weighted average of DS1 and DS3. Customers using tandem-switched transport would also pay a per-minute tandem charge to recover 20% of the Part 69 tandem revenue requirement. We are also seeking comment on what long-term rate structure and pricing approach would be most reasonable in an increasingly competitive access environment, including the appropriate level of the tandem charge and measures to reduce the interconnection charge.

II. PHASE I: EXPANDED INTERCONNECTION FOR SWITCHED TRANSPORT

9. The *Special Access Expanded Interconnection Order* requires the Tier 1 LECs to offer expanded interconnection to facilitate competitive provision of special access transmission. In this Phase of the Notice, we propose to extend this requirement to facilitate competitive provision of transmission used in switched transport. We examine broader issues involving the interconnection of competitive switched access networks in Phase II of this Notice.[11]

A. Effects of Expanded Interconnection for Switched Transport

10. In the *Special Access Expanded Interconnection Order*, we find that expanded interconnection for interstate special access services will bring important public interest benefits by expanding service choices for telecommunications users, heightening incentives for efficiency, speeding technological innovation, and lowering rates for services subject to competition.[12] We believe that similar benefits will arise from expanded interconnection for switched transport. The introduction of expanded interconnection for interstate switched transport would produce substantial benefits in addition to those to be realized from interstate special access expanded interconnection. The 1991 Tier 1 LEC revenues from the interstate switched transport element were approximately $4.2 billion.[13] Expanded competition and its associated pricing changes would provide a stimulus on the switched services side for increased efficiency in LEC operations, improved service provision, and greater access to diverse facilities that could improve network reliability.

11. In addition, expanded interconnection for switched transport would bring the benefits of increased competition for local access services to a broader range of services, and therefore users, than just special access services. While large businesses with significant volumes of telecommunications traffic use interstate special access services, most American businesses and individuals use interstate services that depend on switched access. Rate reductions and improved service quality for interstate switched transport services would benefit all of these end users.

12. The issues surrounding expanded interconnection for interstate switched transport, however, are potentially more difficult than those associated with special access expanded interconnection. For example, increased competition could bring greater pressure to bear on support flows in the LECs' current rate structures and pricing for switched services. The extent of the pressure on existing support flows will depend on several factors, including the overall rate of growth of the interstate switched access market, LEC efficiency gains, state and federal policies on expanded interconnection, pricing flexibility, and separations and access charge reform. Many parties have urged the Commission to proceed cautiously with expanded interconnection for interstate switched transport, arguing that it could have

[9] A list of parties filing comments and reply comments is contained in Appendix A.

[10] *See Transport Order* at Appendix D (revised 47 C.F.R. § 69.108).

[11] *See infra* ¶ ¶ 40-53.

[12] *See Special Access Expanded Interconnection Order* at ¶ ¶ 13-18.

[13] ARMIS Form 43-01 (4th Quarter 1991).

an indirect effect on local exchange rates through the shifting of costs to the state jurisdiction in the separations process.[14]

13. We tentatively conclude that we can successfully address any potentially adverse effects of increased access competition. For example, applying the *Transport* interconnection charge to all parties who interconnect with the LECs for the provision of switched transport should greatly reduce any immediate pressure on support flows currently built into the LECs' transport rates. As a result, we believe that we can facilitate competition for the provision of interstate switched transport through expanded interconnection without undermining universal service.

14. Based on this analysis, we tentatively conclude that, properly structured, expanded interconnection for switched transport will produce substantial benefits for customers that outweigh any potential detriments. Interested parties are invited to comment on our analysis and this tentative conclusion, addressing the potential benefits of switched transport expanded interconnection and possible drawbacks. We also invite interested parties to comment on the public policy effects of existing support flows and possible measures for mitigating any anticipated hardships due to pressure on these support flows.

B. Architecture and Standards for Interconnection Arrangements

1. Issues Resolved in the Special Access Expanded Interconnection Order

15. In the *Special Access Expanded Interconnection Order*, we are adopting interconnection architecture and other related standards xgoverning Tier 1 LECs' offerings of expanded interconnection for interstate special access.[15] We fully expect that the interconnection facilities provided by the LEC for special access expanded interconnection will also be used to provide interconnection for switched transport. Accordingly, we tentatively conclude that the basic interconnection architecture adopted in the *Special Access Expanded Interconnection Order* should extend to switched transport expanded interconnection arrangements. We therefore propose to require the Tier 1 LECs to offer expanded interconnection for the provision of switched transport through physical collocation when requested by interconnectors, subject to limited exceptions. An exemption from the requirement that LECs make physical collocation available upon request would be available only if a particular central office lacks physical space to accommodate physical collocation, or if a formal decision is adopted by a state legislature or public utility regulatory agency, after proceedings allowing all interested parties a reasonable opportunity to be heard, in favor of virtual collocation rather than physical collocation for intrastate expanded interconnection, or in favor of allowing LECs to choose which form of interconnection to use for intrastate expanded interconnection. We would also require the provision of virtual collocation in certain circumstances, subject to minimum standards allowing the interconnector to monitor and control its circuits terminating in LEC central offices and to reasonably designate central office electronic equipment dedicated to its use.

16. We also tentatively conclude that the subsidiary requirements and standards that we are adopting for special access expanded interconnection offerings should also apply to expanded interconnection arrangements for the provision of switched transport, unless otherwise specified. In particular, we propose that LECs offering switched transport expanded interconnection through physical collocation be required to allocate central office space on a first-come, first-served basis and to offer virtual collocation if space is exhausted in any given office. We also tentatively conclude that LECs should be required to specify an interconnection point or points as close as reasonably possible to the office. In addition, we believe that LECs should be required to provide interconnectors with at least two points of entry to each office when there are at least two entry points for LEC cable. Finally, we tentatively conclude that expanded interconnection opportunities must be made available to interconnectors using fiber optic and, where reasonably feasible, microwave facilities.

17. In the *Special Access Expanded Interconnection Order*, we are giving interconnectors the right to place or designate only equipment used for transmission, such as optical terminating equipment, multiplexers, and microwave antennae, within or on the LECs' central offices.[16] We determine there that interconnectors are not entitled to locate other types of equipment, such as computers used for providing enhanced services or customer premises equipment, in LEC central offices or on their buildings. We tentatively conclude that this holding of the *Special Access Expanded Interconnection Order* should extend to switched transport expanded interconnection.[17]

18. Interested parties are invited to comment on these tentative conclusions. Parties believing that a different interconnection architecture or standards for interstate switched transport expanded interconnection would better meet the goals of this proceeding should clearly delineate the differences between expanded interconnection for special access and switched transport that warrant different treatment, and explain why the treatment they propose would be in the public interest.[18]

2. Interconnection Locations in the LEC Network

19. In the *Special Access Expanded Interconnection Order*, we require, in part, that LECs make special access expanded interconnection available at all end offices and SWCs. End offices and SWCs aggregate and concentrate traffic, and thus are essential interconnection points if the objectives of our interconnection policy are to be achieved. Thus, we tentatively conclude that Tier 1 LECs should also be required to provide expanded interconnection for interstate switched transport at all end offices and SWCs.

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[14] *See, e.g.*, SW Bell Reply Comments at 10-18 and Apps. A & B; TDS Comments at 21-22; OPASTCO Comments at 2-5; Florida Comments at 3-4; Alabama Reply Comments at 3-7.

[15] *See Special Access Expanded Interconnection Order* at ¶ ¶ 29-46, 69-109.

[16] Location of this equipment in or on the LEC central office is necessary to permit termination of interconnected circuits.

[17] *See infra* ¶ ¶ 47-49.

[18] Parties seeking to challenge the architecture decisions made in the *Special Access Expanded Interconnection Order* should do so through petitions for reconsideration of that order.

20. We do not address expanded interconnection to LEC tandem switches in the *Special Access Expanded Interconnection Order*, since tandem switches are not used to provide special access. In the context of switched transport interconnection, however, interconnection at LEC tandem switches would enable interconnectors to interconnect with LEC switched access facilities at points with greater levels of traffic aggregation. The interim rate structure that we are adopting today in the *Transport Order* may tend to impede competitive provision of transport through interconnection at access tandem switches. Nevertheless, to enhance the opportunity for competition, we tentatively conclude that Tier 1 LECs should also be required to provide expanded interconnection for switched transport at tandem switches.

21. In the *Special Access Expanded Interconnection Order*, we also require LECs to offer interconnection at any remote distribution nodes used as rating points (*i.e.*, relevant points for calculating rates). Different considerations may exist with respect to remote nodes for special access and switched transport expanded interconnection. It appears that the LECs' switches used at remote nodes generally would be unable to route outgoing interexchange access traffic to an interconnector, because routing functions are typically performed by the host switch.[19] Interconnectors may also be unable to route terminating traffic to the LECs at such remote nodes.[20] These obstacles to routing switched traffic to and from LEC remote nodes appear to make infeasible expanded interconnection for the provision of switched transport at remote switches in host/remote arrangements. Thus, we tentatively conclude that the LECs should not be required to make expanded interconnection for switched transport available at these locations.

22. We seek comment on these tentative conclusions. We also ask interested parties to address the apparent technical barriers to interconnection at remote nodes and to provide us with additional information regarding the practicability or desirability of such interconnection. Finally, we seek comment on whether there are other points in the LEC switched network at which interconnection for switched transport should be required.

C. Availability of Expanded Interconnection for Switched Transport

23. In the *Special Access Expanded Interconnection Order*, we conclude that all Tier 1 LECs except NECA pool members should be required to provide special access expanded interconnection.[21] We also determine that special access expanded interconnection should be available to all third parties. We require AT&T and any other parties with facilities already located in buildings containing a LEC office to interconnect under the same terms and conditions as all other interconnectors and to pay the same connection charges for all elements of special access expanded interconnection offerings as others.[22]

24. We tentatively conclude that we should determine which parties must offer switched transport expanded interconnection and which parties are entitled to receive this service as we do in the *Special Access Expanded Interconnection Order*. We see no reason to distinguish in this regard between expanded interconnection for special access and switched transport. The same LECs and interconnectors that develop special access expanded interconnection arrangements can also use these facilities for switched transport expanded interconnection. We specifically propose to require all Tier 1 LECs, except NECA pool members, to offer switched transport expanded interconnection to all third parties.[23] We also tentatively conclude that we should impose the same requirements on AT&T for switched transport interconnection as we adopt for special access expanded interconnection. Parties are asked to comment on these proposals, and on whether there are any attributes of interstate switched transport expanded interconnection that would require or justify different decisions on these issues.

D. Pricing and Rate Structure

1. Issues Resolved in the Special Access Expanded Interconnection Order

25. As with architecture matters, we generally propose to resolve the rate structure and pricing issues for switched transport expanded interxconnection as we do for special access. In particular, we tentatively conclude that the pricing policies we adopt with regard to the connection charges that interconnectors pay LECs for interstate special access expanded interconnection should apply to switched transport expanded interconnection offerings. Thus, we propose that the LECs use a consistent direct cost methodology to price initial connection charges and other similar services, and justify any deviations from uniform overhead loadings. The net revenue test could not be used by the LECs to justify initial charges, and subsequent changes in connection charge rates would be excluded from price cap regulation, pending further Commission action.

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[19] In particular, a remote node may not be able to determine which outgoing calls to route to an interconnector.

[20] For example, many remote offices are not listed in the local exchange routing guide and, in many circumstances, a host and its remote share an NXX code. Accordingly, under the existing network configuration, it may be impossible to terminate traffic at such a remote node without passing through the host switch.

[21] *See Special Access Expanded Interconnection Order* at ¶ ¶ 56-58. Some parties commenting on the *NOI* assert that the LECs should have the same collocation rights on interconnector premises that interconnectors have in LEC offices. We tentatively conclude that reciprocal obligations need not be imposed, because it appears that most CAPs and other interconnecting carriers will offer interconnection to the LECs voluntarily and do not provide "bottleneck" facilities. There may be additional legal and policy questions regarding reciprocal obligations for non-carrier interconnectors, such as end users. We invite comment on these issues.

[22] For example, AT&T and any other parties with facilities located in buildings containing LEC offices are required to interconnect using fiber optic facilities, although they are not required to actually route their fiber optic cable out of the LEC office and back in through the same route used by other interconnectors. They are, however, required to compensate the LECs as if this configuration were used. *See Special Access Expanded Interconnection Order* at ¶ ¶ 65-68.

[23] Thus, we tentatively conclude that parties such as radio common carriers, cellular carriers, and personal communications service (PCS) providers should have the option of using switched transport expanded interconnection offerings, if they so desire, subject to the same terms and conditions that apply to other interconnectors. Expanded interconnection would be an additional option for such parties and would not replace other interconnection opportunities available to these entities.

26. We also tentatively conclude that the rate structure for switched transport expanded interconnection should parallel the rate structure we adopt for special access expanded interconnection. Thus, connection charges (including the cross-connect element)[24] for switched transport expanded interconnection services would not be formally unbundled from LEC transport rates. Instead, the LECs would establish new connection charge elements for switched transport expanded interconnection. Many of the new connection charge elements that the LECs create for special access expanded interconnection should also be appropriate for switched transport expanded interconnection arrangements. To the extent that new connection charges must be created for switched transport expanded interconnection, they should be structured as new rate elements as well.[25]

27. In addition, we propose to apply to switched transport expanded interconnection the same tariffing standards as for special access expanded interconnection. Specifically, we propose that for switched transport expanded interconnection, as with special access, the cross-connect element is to be generally available at averaged rates; other features of physical and virtual collocation offerings are to be provided under uniform rates, terms, and conditions for each central office; and central office electronic equipment dedicated to interconnectors' use in virtual collocation arrangements may be provided pursuant to individually negotiated tariff provisions, but such rates, terms, and conditions must be made available to other similarly situated interconnectors on a non-discriminatory basis.

28. Parties are asked to present their views on whether we should carry over these policies from special access to switched transport expanded interconnection, or whether different standards for rate structure and rate levels would better serve the public interest. Parties believing that the rates for the cross-connect element and other connection charges should differ for special access and switched transport expanded interconnection should justify such conclusions, including evidence of any differences in the cost of providing such services.[26]

2. Contribution and Interconnection Charges

29. In the *Special Access Expanded Interconnection Order*, we determine that no contribution charge should apply initially to LEC special access expanded interconnection offerings, and instead propose to eliminate the over-allocation of GSF costs to special access. We also establish standards governing any future LEC petitions seeking a contribution charge.[27] In the *Transport Order*, we define an interconnection charge to be paid by all parties interconnecting with the LEC switched access network, as well as LEC access customers.[28]

30. When an IXC buys transport provided by a CAP using expanded interconnection, the interconnection charge could be paid directly by the IXC, or could be paid by the CAP, which would then seek to recover the charge from its IXC customer. We tentatively conclude that in such cases, in the interests of overall billing simplicity, the IXC should pay the interconnection charge directly to the LEC, rather than indirectly through the CAP. When an end user employs expanded interconnection to carry its switched traffic to an IXC, we tentatively conclude that the IXC should pay the interconnection charge and pass those costs on to the interconnector. We seek comments on these tentative conclusions.

31. In addition, we anticipate that in certain cases, an interconnector may connect a single transmission path to both switched and special access services. For example, an interconnector at a central office may connect a DS3 to a LEC's multiplexer, which converts the DS3 to 28 DS1s, of which 20 are used for special access and 8 used for direct-trunked transport. In such cases, we propose to require the LECs to use a procedure similar to their current procedures for billing shared use of facilities for switched transport and special access.[29] In the example given above, the interconnector or its customer would pay the applicable interconnection charge for switched transport service on a per minute basis, plus 20/28ths of any applicable contribution charge for the special access DS3 service.[30] We ask interested parties to comment on this proposal.

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[24] The cross-connect element covers the short cable and related facilities within the LEC central office linking the interconnector owned or designated equipment to the LEC distribution frame or its equivalent.

[25] As with special access expanded interconnection, we tentatively conclude that the magnitude of connection charges should not vary based on the number or type of interconnected circuits an interconnector has unless the LEC's cost of providing service depends upon the number or type of interconnected circuits. *See Special Access Expanded Interconnection Order* at ¶ 121. This principle would also apply when interconnectors use the same LEC facilities for both special access and switched transport expanded interconnection.

[26] We also seek comment on whether cross-connect charges should differ depending on whether interconnected services are connected to end office switches, SWCs, or tandem switches.

[27] Any future contribution charge would be limited to recovering specifically identified regulatory support flows or cost misallocations that are embedded in LEC special access rates for services subject to competition. *See Special Access Expanded Interconnection Order* at ¶ ¶ 143, 146-47.

[28] *See Transport Order* at ¶ ¶ 61-64 & nn.124, 178. The transport "interconnection charge," which must be paid by both LEC customers and interconnectors or their customers, recovers transport revenues not recovered through the other transport rate elements. Thus, it differs from the "connection charge" rate elements paid by interconnectors for expanded interconnection services provided by the LECs, such as floor space under physical collocation.

[29] The Commission ordered the LECs to continue allowing customers to use LEC special access facilities to carry switched traffic as well, in *Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1225, 1282 (1984). Under this procedure, referred to as "ratcheting," the LEC applies the per-minute transport charge to the switched traffic and proportionately reduces the special access rate to reflect the share of the special access circuit used to carry switched traffic. In the *Special Access Expanded Interconnection Order*, we conclude that interconnectors should not be allowed to ratchet because of our concern about how this would affect the switched transport market. *See Special Access Expanded Interconnection Order* at ¶ ¶ 108-09.

[30] If the interconnector's own (or designated) equipment performed the multiplexing function, the interconnector's circuits would be cross-connected with the LEC's services at the DS1 level, and the appropriate DS1 contribution charge or interconnection charge would apply to each circuit depending on whether it was connected to LEC special access or switched transport services.

3. LEC Switched Transport Pricing Flexibility

32. We anticipate that implementation of expanded interconnection for switched transport will significantly increase the competition faced by LECs in the provision of access services. Accordingly, after a LEC has implemented expanded interconnection for switched transport, we believe that it should have a greater degree of pricing flexibility for its switched transport services. Since continued application of study-area-wide rate averaging for transport rates after expanded interconnection would appear to force the LECs to price above cost in the urban areas where competition is most intense, we seek comment on application of the density pricing zone structure adopted today for special access interconnection[31] to direct-trunked and tandem-switched transport when expanded interconnection for transport is operational in a particular study area.

33. We propose to allow LECs with operational expanded interconnection arrangements implemented in compliance with our rules to set rates for entrance facilities and direct-trunked and tandem-switched transport that are averaged within zones but that differ between zones. The LECs would use the same zones for density pricing of transport that they use for densityp pricing of special access.[32] LECs subject to the price cap rules would create a subindex for direct-trunked transport rates in each of the zones, a subindex for tandem-switched transport rates in each of the zones, and a subindex for entrance facility rates in each of the zones. Price cap LECs could raise rates in each zone by up to 5% annually relative to the price cap index (PCI) applicable to the traffic sensitive basket and could lower rates by up to 10% annually relative to the PCI without triggering any of the additional cost justification or advance notice requirements contained in the price cap rules.[33] We also seek comment on the application of density pricing zones to dedicated signalling transport,[34] which uses common channel signalling (CCS) systems.

34. Under the rate bands that we are adopting in the *Transport Order* and that would continue to apply to the overall direct-trunked transport and entrance facility subindexes, however, the price cap LECs could not raise or lower the weighted average of all direct-trunked transport rates, or the weighted average of all entrance facility rates, by more than 5% per year adjusted for the PCI without additional cost justification. Similarly, these LECs could not raise the weighted average of all tandem-switched transport rates by more than 2% relative to the PCI, nor lower them by more than 5% annually, without additional justification. The LECs would be allowed to implement density pricing of transport in a given study area only after switched transport expanded interconnection is operational in that study area. As with special access density pricing, we would monitor this system closely and review it in the autumn of 1995.

35. Interested parties should submit comments on whether the type of switched transport pricing flexibility proposed here is sufficient, or whether the Commission should further modify its rate structure and pricing rules for LEC transport to ensure that LECs are able to respond adequately to increased competition. In particular, we seek comment on whether the LECs should be allowed to implement volume and term discounts for the provision of switched transport in a given study area once expanded interconnection is operational.

E. Other Issues

1. Timing and Implementation

36. Several parties have advanced proposals regarding the timing of related Commission proceedings concerning interstate access and jurisdictional separations. For example, USTA and several individual LECs advocate delaying adoption of switched transport expanded interconnection requirements until after the Commission makes certain comprehensive changes to the access charge and separations rules. They also emphasize that switched transport expanded interconnection requirements should not become effective until after the LECs have implemented the changes in the local transport rate structure required by the *Transport Order*. By contrast, the CAPs argue that switched transport expanded interconnection should be implemented as quickly as possible to enable them to compete with the LECs in the provision of a full range of interstate access services.

37. We tentatively conclude that expanded interconnection for switched transport should become effective no later than the interim transport rate structure does. The implementation of expanded interconnection should not await the completion of other proceedings involving access charge or separations rule changes.[35]

38. Parties are asked to comment on our proposals regarding the timing for implementation of expanded interconnection for switched transport. We also seek comment on whether we should adopt interim measures to expedite interstate expanded interconnection in the case of LECs and interconnectors that already have intrastate switched access expanded interconnection arrangements in place.

2. Jurisdictional Measurement

39. LECs and interconnectors are likely to use the same facilities to provide both intrastate and interstate services.[36] When terminating switched traffic is handed off to the LECs, they generally will be unable to determine the jurisdictional nature of the traffic. Since the LECs generally apply different access charges for intrastate and interstate traffic, it may be necessary to impose some jurisdictional

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[31] *See Special Access Expanded Interconnection Order* at ¶ ¶ 172-86.

[32] *See Special Access Expanded Interconnection Order* at ¶ 179-80. If a LEC has not established density pricing of special access but wishes to do so for transport, we tentatively conclude that it must follow the same standards and procedures governing the creation of zones adopted in the *Special Access Expanded Interconnection Order*.

[33] As under the special access density pricing zone system, rate-of-return LECs with operational switched transport expanded interconnection arrangements, implemented in compliance with our rules, could set rates for the same direct-trunked transport, tandem-switched transport, and entrance facility services in different zones that diverge by a maximum of 15 percent in the first year that these tariff revisions are in effect, 30 percent in the second year, and 45 percent in the third year.

[34] *See Transport Order* at Appendix D (new 47 C.F.R. § 69.2(nn)).

[35] We direct the LECs and other interested parties to resolve technical implementation issues, such as billing system changes, in a timely manner through industry organizations and other forums.

[36] The same facilities are also likely to be used to provide both switched and unswitched services.

reporting requirements on interconnecting parties.[37] We tentatively conclude that in such circumstances, interconnectors or their customers should be required to report their percentage of interstate use (PIU) to the LECs.[38] Parties are asked to comment on our proposal to require reporting of the PIU for interconnected switched traffic when necessary to allow the LECs to determine the jurisdictional nature of traffic carried by their facilities. We also seek comment on whether CAPs or their IXC customers should be responsible for providing this information. We also ask interested parties to address whether there is a need to refer to a Joint Board further separations issues of the kind referred concerning special access[39] if the Commission adopts its proposal for expanded interconnection for the provision of switched transport.

III. PHASE II: COMPETITIVE SWITCHED ACCESS NETWORKS

40. The prior Phase of this Notice addresses the provision of competitive transport transmission services. Certain parties have requested additional measures, such as access to LEC signalling information, to permit operation of competitive switched transport networks able to offer features such as tandem switching.[40] In this Phase of the Notice, we address the issues raised by this more comprehensive form of switched transport competition.

A. Effects of Competitive Switched Access Networks

41. We tentatively conclude that broader interconnection measures to facilitate access competition, including access to LEC signalling, could produce public interest benefits -- including greater service choices for telecommunications users, heightened incentives for efficiency, accelerated technological innovation, and lower rates for services subject to competition. This would broaden the scope of access competition to include tandem switching functions. Moreover, interconnection among competitive switched access networks could, depending on the transport rate structure, facilitate access competition for tandem-switched transport services used by many of the smaller IXCs. This should help ensure that the pricing relationships between tandem-switched and direct-trunked transport are based on market realities, reducing, or even eliminating, the need to rely on regulatory safeguards to maintain this balance. Competition in the provision of tandem-switched transport service would also encourage LECs to improve their efficiency in aggregating interexchange traffic. In light of our decision to apply the interconnection charge to interconnectors or their customers, we believe that these measures would not impose significant additional pressure on support flows reflected in the LECs' rates.

42. Based on this analysis, we tentatively conclude that the public interest benefits likely to result from measures that facilitate the development of competitive switched access networks will be substantial and will outweigh any potential detriments. We seek comment on this analysis and our tentative conclusion. Interested parties should address any relevant differences between the benefits of switched transport expanded interconnection and the effects of the broader measures we are proposing here.

B. Architecture and Standards

1. Interconnector Access to LEC Signalling Features and Functions

43. WilTel filed a petition for rulemaking that, among other things, requests that the LECs be required to unbundle and provide third parties with the same signalling information that they currently transmit to their own tandem switches, in order to enable third parties to concentrate the interstate access traffic of multiple IXCs and provide a service competing with LEC tandem-switched transport.[41] WilTel states that LECs aggregate originating traffic from their end offices at the tandem switch and use carrier identification signalling that enables the tandem switch to route the traffic to the appropriate IXCs. WilTel argues that LECs should offer this signalling as a Basic Serving Element (BSE), and should be prohibited from imposing any restrictions on the use of their dedicated circuits for the provision of competitive tandem service. WilTel submits that this would facilitate tandem-switched transport competition, thereby helping to control the relative prices of LEC-provided direct-trunked and tandem-switched transport. Some of the CAPs have raised similar issues, arguing that the LECs should be required to provide interconnectors with the signalling necessary to permit an interconnector to provide tandem-type switching.[42] America's Carriers Telecommunications Association (ACTA) also supports WilTel's petition.[43]

44. Ameritech states that it does not oppose the relief requested by WilTel, but asserts that no Commission action is needed to permit IXC resale of LEC dedicated facilities.[44] SW Bell, on the other hand, opposes WilTel's petition, arguing that the request is inconsistent with WilTel's position that the LECs should reduce the number of access tandems in their networks in order to improve interexchange traffic concentration levels.[45] BellSouth also opposes the petition. It states that requiring LECs to transmit signalling information to interconnectors would require changes to the multi-frequency signalling protocols associated with Feature Group D switched access. As a result, BellSouth argues that industry organizations such as the

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[37] Information on the jurisdictional nature of the traffic may also be relevant for separations purposes.

[38] In most cases, it appears that an IXC using CAP services would have the relevant information.

[39] *See infra* ¶ ¶ 54-55.

[40] Entities providing such competitive access networks may well wish to interconnect their facilities with those of the LECs at LEC end offices or tandem switches.

[41] Petition for Expedited Rulemaking to Effect Tandem Competition and Tandem Regulation With the Introduction of New Transport Rate Structures, filed by WilTel, Inc. (June 11, 1992).

[42] MFS Comments at 126-27; *Ex Parte* Letter from Robert C. Atkinson, Senior Vice President-Regulatory and External Affairs, Teleport Communications Group, to James D. Schlichting, Chief, Policy & Program Planning Division (Nov. 19, 1991).

[43] Statement of America's Carriers Telecommunications Association in Support of Petition for Expedited Rulemaking of WilTel, Inc. (July 2, 1992).

[44] *Ex Parte* Letter from Fred K. Konrad, Director, Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC (July 8, 1992).

[45] *Ex Parte* Letter from William A. Blase, Jr., Director - Federal Regulatory, Southwestern Bell Corporation, to Donna Searcy, Secretary, FCC (July 10, 1992).

Exchange Carriers Standards Association's T1 Committee would be a more appropriate forum for consideration of this issue.[46]

45. Fully competitive provision of switched transport networks would appear to require access to certain signalling features and functions within the LEC network. We propose to require that the LECs provide interconnectors access to the signalling features and functions within the LEC network that interconnectors need to create switched access networks to compete with the LECs.[47] These functions would appear to include, among other things, access to the signalling information necessary to perform tandem switching functions, whether provided through in-band signalling or out-of-band signalling through CCS systems.[48] We believe that such signalling should be made available at both end office and tandem switches.[49]

46. We invite interested parties to comment on these tentative conclusions and proposals. In particular, we invite comment on whether there are other features or functions to which LECs should be required to give interconnectors access and whether such access could have an effect on public switched network reliability. We also ask parties to comment on whether these signalling functions should be treated as BSEs within our ONA framework. Parties are invited to submit information on any technical difficulties that such requirements might entail, and to suggest possible solutions to such technical problems.

2. Collocation of Equipment in LEC Central Offices

47. In the context of the interconnection of competing switched access networks in a "network of networks," we tentatively conclude that collocation of competitors' switches in LEC central offices is neither necessary nor desirable. We also tentatively conclude that interconnectors should not be entitled to place in the central office, or designate for their use in the LEC central office, other types of switch-related equipment, such as that used for call recording and traffic measurement. Interconnector transmission equipment must be located in LEC central offices in order to terminate interconnector circuits, but CAPs and other interconnectors can readily connect their transmission facilities to switches and related equipment located on their own network premises. Indeed, we would expect that competitive switched access network providers would prefer locating their switches on their own network premises. Furthermore, unlike transmission equipment, switching facilities can occupy a substantial amount of floor space. Thus, we believe that collocation of switching equipment in LEC central offices could contribute greatly to space exhaustion.

48. We invite parties to comment on our tentative conclusion that collocation of switching equipment should not be required. We also seek comment on our proposal not to require collocation of related equipment, such as that used for call recording and traffic measurement.

49. In its comments, the International Data Communications Manufacturers Association, Inc. (IDCMA) argues that collocation opportunities should not be limited to parties providing their own transmission facilities. Instead, IDCMA proposes that parties be allowed to use space in LEC central offices for the collocation of customer equipment to be connected to LEC-provided transmission facilities.[50] For example, IDCMA states that the use of advanced line cards could permit large business users to make more efficient use of LEC copper cable facilities.[51] Although this proposal was not encompassed by the original Notice in this proceeding, we now invite interested parties to comment on IDCMA's proposal.

C. Pricing and Rate Structure

1. Pricing of Signalling Services Used By Interconnectors

50. We seek comment on whether LEC-provided functionalities such as out-of-band signalling information associated with CCS systems and other xsignalling information should be priced in accordance with the test applicable to the pricing of new services. Under this test, the LECs must develop, justify, and apply a consistent methodology for deriving the direct cost of providing similar new offerings, and must justify any deviation from uniform overhead loadings.[52] As with connection charges under special access and switched transport expanded interconnection, we propose that the LECs not be allowed to use the net revenue test to justify such new service charges.

2. Recovery of Subsidy Flows

51. In the *Transport Order*, we institute an interconnection charge that will initially recover the relatively large amounts of non-cost-related revenue currently assigned to the transport category. In that Order, we also require that this charge apply to all traffic carried on competitive transport networks unless the traffic bypasses LEC facilities entirely.[53] We tentatively conclude that there is no need to develop an additional charge to recover support flows associated with tandem switching, since the interconnection charge already includes any such support flows. Parties are invited to comment on our tentative conclusion that no additional contribution charge is necessary for interconnecting switched access networks.

3. Pricing Flexibility

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[46] *Ex Parte* Letter from W.W. Jordan, Director - Federal Regulatory, BellSouth, to Donna Searcy, Secretary, FCC (July 8, 1992).

[47] In this Notice, we do not address expanded interconnection for the provision of subscriber loops. We also do not address the interoperability of LEC local switches and other parties' switches required for competitive provision of local exchange service.

[48] For example, LECs use carrier identification signalling to direct tandem-switched traffic to the appropriate IXC. Accordingly, such signalling must be available to an interconnector if the interconnector is to provide a service that competes with LEC access tandem functions.

[49] Under our current rules, interconnectors, just as other parties using the switched access network, will have access to the federally tariffed Basic Serving Arrangement (BSA) elements provided under our Open Network Architecture (ONA) policies.

[50] IDCMA Comments at ii, 13-16; IDCMA Reply Comments at 3-4, 6-8.

[51] *See generally Ex Parte* Letter from Herbert E. Marks, Squire, Sanders & Dempsey to Cheryl Tritt, Chief, Common Carrier Bureau , FCC (August 31, 1992).

[52] *Policy and Rules Concerning Rates for Dominant Carriers*, Order on Reconsideration, 6 FCC Rcd 2637, 2693-96 (1991); *Special Access Expanded Interconnection Order* at ¶ ¶ 127-31.

[53] *See Transport Order* at ¶ ¶ 61-64 & nn.124, 178.

52. We have granted the LECs a certain degree of flexibility in pricing special access services that face increased competition in conjunction with our special access expanded interconnection policy.[54] We are proposing a similar grant of pricing flexibility for LEC switched transport, in conjunction with our expanded interconnection proposal in this Notice.[55] We seek comment on whether we should give LECs additional pricing flexibility as part of our proposal to permit provision of competitive switched access networks.

D. Jurisdictional Measurement

53. As noted above, we are proposing to require interconnectors or their IXC customers to report their PIUs to the LECs when the LECs are unable to determine the jurisdictional nature of traffic carried over interconnector circuits using switched transport expanded interconnection.[56] Similar but more complex issues may arise when third parties are providing switching services. Accordingly, we tentatively conclude that operators of competitive switched access networks interconnecting with the LECs' switched network, or their customers, should be required to measure the jurisdictional nature of their traffic, and report it to the LECs. We request comment on this tentative conclusion. Among other things, commenting parties should address whether CAPs or their IXC customers should be responsible for providing this information. We also ask interested parties to discuss whether our proposal for competitive provision of tandem-switched transport service raises separations issues that should be referred to a Joint Board.

IV. SEPARATIONS

54. The current separations procedures do not specifically contemplate the provision of expanded interconnection. Accordingly, we ask the Federal-State Joint Board in CC Docket No. 80-286 to determine whether separations changes are necessary in light of special access expanded interconnection to ensure a reasonable jurisdictional allocation. If the Joint Board believes that this is necessary, we ask it to undertake the limited task of preparing recommended separations revisions designed to identify LEC expanded interconnection costs and revenues, and allocate them between the state and federal jurisdictions.[57]

55. We do not intend the Joint Board to consider broader separations issues in the context of this referral. Such matters should be the subject of a comprehensive separations review proceeding.[58] We request that the Joint Board expedite its consideration of the expanded interconnection issues and make its recommendation to the Commission as soon as possible. Parties should file their comments on this issue directly with the Joint Board.

V. PROCEDURAL MATTERS

A. *Ex Parte*

56. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

B. Regulatory Flexibility Act

57. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by § 601(3) of the Regulatory Flexibility Act. The LECs providing interstate access services directly subject to the proposed rule amendment are large corporations or affiliates of such corporations. In most cases, the IXCs and CAPs required to report PIUs are also large corporations or affiliates of large corporations. To the extent that this reporting requirement would apply to small entities, it would not have a significant economic impact on a substantial number of small business entities. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with ¶ 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq* (1981).

C. Notice and Comment Provision

58. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties are to file comments on Phase I of this Second Notice of Proposed Rulemaking on or before December 4, 1992, and reply comments on or before December 21, 1992. Parties are to file comments on Phase II of this Notice on or before December 21, 1992, and reply comments on or before January 22, 1993. Parties are to file comments with the CC Docket No. 80-286 Joint Board concerning the separation of expanded interconnection costs on or before December 21, 1992, and reply comments on or before January 22, 1993. Comments and reply comments on Phases I and II of this Notice and on the separations issues are to be filed in three separate, clearly labeled documents. To file formally in this proceeding, persons must file an original and five copies of all comments, reply comments, and supporting comments. Parties that want each Commissioner to receive personal copies of their comments must file originals plus nine copies. Parties should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Two copies of the comments concerning the separa-

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[54] *See Special Access Expanded Interconnection Order* at ¶ ¶ 172-86.

[55] *See supra* ¶ ¶ 32-35.

[56] *See supra* ¶ 39.

[57] Expanded interconnection for special access will use certain LEC facilities differently than LEC-provided special access does. For example, under physical collocation, interconnectors would rent space in the central office from the LEC, while existing separations procedures allocate the costs of central office space among LEC services as part of GSF.

[58] For example, such issues would be covered by the consultant's report contemplated by the Joint Board in the comprehensive separations review proceeding it is currently considering.

tions issues are also to be filed with all CC Docket No. 80-286 Federal-State Joint Board Commissioners, staff members, and other persons listed in Appendix B. Parties should also file one copy of any documents filed in this proceeding with the Commission's copy contractor, Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. For further information regarding this Second Notice of Proposed Rulemaking, contact David L. Sieradzki, Common Carrier Bureau, Policy and Program Planning Division, (202) 632-9342.

VI. ORDERING CLAUSES

59. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes regarding expanded interconnection for the provision of interstate switched transport, LEC pricing flexibility for switched transport, and competitive switched access networks described above, and that COMMENT IS INVITED on these proposals.

60. IT IS FURTHER ORDERED, that the issues described in paragraphs 54-55, *supra*, are referred to the Federal/State Joint Board in CC Docket No. 80-286 for the preparation of a Recommended Decision.

61. IT IS FURTHER ORDERED that the Petition for Expedited Rulemaking filed by WilTel IS GRANTED to the extent indicated herein.[59]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS FILED IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING (CC DOCKET NO. 91-141)

August 6, 1991

Ad Hoc Telecommunications Users Committee (Ad Hoc)

Allnet Communication Services (Allnet)

American Newspaper Publishers Association (ANPA)

American Petroleum Institute (API)

Ameritech Operating Companies (Ameritech)

Association for Local Telecommunications Services (ALTS)

Association of American Railroads (AAR)

AT&T

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telephone Companies (BellSouth)

California Bankers Clearing House Association and New York Clearing House Association (Bankers)

The People of the State of California and the Public Utilities Commission of the State of California (California)

Central Telephone Company (Centel)

Cellular Service, Inc.

Cincinnati Bell Telephone Company (Cincinnati Bell)

Competitive Telecommunications Association (CompTel)

CompuServe Inc. (CompuServe)

Digital Direct, Inc. (Digital Direct)

Public Service Commission of the District of Columbia (D.C.)

EDS Corporation (EDS)

Florida Public Service Commission (Florida)

FMR Corp. (FMR)

General Communication, Inc. (GCI)

U.S. General Services Administration (GSA)

GTE Service Corporation (GTE)

Illinois Commerce Commission (Illinois)

Independent Data Communications Manufacturers Association, Inc. (IDCMA)

Indiana Digital Access, Inc. (IDA)

Information Industry Association (IIA)

Institutional Communications Company (ICC)

Intermedia Communications of Florida, Inc. (Intermedia)

International Communications Association (ICA)

Lincoln Telephone and Telegraph Company (Lincoln)

Local Area Telecommunications, Inc. (Locate)

MCI Telecommunications Corporation (MCI)

MetroComm

Metropolitan Fiber Systems, Inc. (MFS)

Michigan Public Service Commission Staff (Michigan)

MidAmerican Communications Corporation (MidAmerican)

National Association of Regulatory Utility Commissioners (NARUC)

National Exchange Carrier Association, Inc. (NECA)

[59] These actions are taken pursuant to Sections 1, 4(i) & (j), 201-205, 218, 220, 403 & 410(c) of the Communications Act of 1934, 47 U.S.C. §§ 151, 154(i) & (j), 201-205, 218, 220, 403 & 410(c).

National Telephone Cooperative Association (NTCA)h)

State Department of Public Service (New York)

NYNEX Telephone Companies (NYNEX)

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

Pacific Bell and Nevada Bell (Pacific)

Penn Access Corporation

Pennsylvania Office of Consumer Advocate

Personal Communications Network Services of New York, Inc. (PCNS-NY)

Puerto Rico Telephone Company (PRTC)

RCI Long Distance of New England, Inc. d/b/a Long Distance

North (Long Distance North)

Rochester Telephone Corporation (Rochester)

Chief Counsel for Advocacy of the U.S. Small Business Administration (SBA)

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (SW Bell)

US Sprint Communications Company Limited Partnership (Sprint)

TDS Telecommunications Corporation (TDS)

Teleport Communications Group (Teleport)

Teleport Denver Ltd. (Teleport Denver)

United States Telephone Association (USTA)

United Telephone System Companies (United)

U S West Communications, Inc. (U S West)

Utilities Telecommunications Council (UTC)

Virginia State Corporation Commission Staff (Virginia)

Wells Rural Electric Company

Williams Telecommunications Group, Inc. (WilTel)

REPLY COMMENTS FILED IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING (CC DOCKET NO. 91-141)

September 20, 1991

Ad Hoc

Alabama Public Service Commission (Alabama)

ALTS

Ameritech

Anchorage Telephone Utility

API

Arkansas Public Service Commission and Missouri Public Service Commission (Arkansas/Missouri)

Associated Communications of Los Angeles, Inc. (ACLA)

AT&T

Bankers

Bay Area Teleport

Bell Atlantic

BellSouth

California

Centel

Cincinnati Bell

CompTel

D.C.

Fairbanks Municipal Utilities System

Electric Lightwave, Inc.

FMR

GCI

GSA

GTE

ICA

ICC

IDA

IDCMA

Intermedia

U.S. Department of Justice (Justice)

Kansas Independent Rural Telephone Companies

Linkatel Communications, Inc.

Locate

Matanuska Telephone Association, Inc.

McCaw Cellular Communications, Inc. (McCaw)

MCI

MFS

MidAmerican

Minnesota Department of Public Service (Minnesota Dept.)

Minnesota Public Utilities Commission (Minnesota Commission)

U.S. National Telecommunications and Information Administration (NTIA)

NECA

New York City Department of Telecommunications and Energy (New York City)

North American Telecommunications Association (NATA)

NTCA

NYNEX

OPASTCO

Pacific

PRTC

Rochester

SNET

Sprint

SW Bell

Tallon, Cheeseman and Associates, Inc. (Tallon Cheeseman)
TDS
Teleport
Teleport Denver
Texas Telephone Association
USTA
United
U S West
WilTel

COMMENTS FILED IN RESPONSE TO SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING (CC DOCKET NO. 91-141)

November 5, 1991

Ameritech
ALTS
Bell Atlantic
BellSouth
California
Centel
Cincinnati Bell
CompTel
Consolidated Telephone Company and Consolidated Telco, Inc. (Consolidated)
GTE
MCI
MFS
NECA
NYNEX
Pacific
Rochester
SNET
Sprint
SW Bell
Tallon Cheeseman
Teleport
Teleport Denver
USTA
United
U S West
WilTel

REPLY COMMENTS FILED IN RESPONSE TO SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING (CC DOCKET NO. 91-141)

December 10, 1991

Ameritech
ALTS
Bell Atlantic
BellSouth
CompTel
GSA
GTE
MCI
MFS
NARUC ("Additional Comments," filed November 27, 1991)
NTCA
NYNEX
Pacific
Rochester
Sprint
SW Bell
Tallon Cheeseman
Teleport
Teleport Denver
USTA
United
U S West
WilTel

APPENDIX B

CC DOCKET NO. 80-286
FEDERAL-STATE JOINT BOARD SERVICE LIST

Honorable Alfred C. Sikes
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814, Stop 0101
Washington, D.C. 20554

Honorable Thomas M. Beard
Commissioner
Florida Public Service Commission
101 East Gaines Street
Fletcher Building
Tallahassee, FL 32399-0850

Honorable Dennis J. Nagel
Commissioner
Iowa Utilities Board
Lucas State Office Bldg.
Des Moines, IA 50319

Honorable Lilo K. Schifter
Commissioner
Maryland Public Service Commission

American Building
231 East Baltimore Street
Baltimore, MD 21202-3486

Honorable Sharon L. Nelson
Chairman
Washington Utilities and Transportation Board
Chandler Plaza Building
1300 South Evergreen Park Drive, S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Honorable Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844, Stop 0103
Washington, D.C. 20554

Honorable Ervin S. Duggan
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832, Stop 0104
Washington, D.C. 20554

Ronald Choura
Chairman, Federal-State Joint Board Staff
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48910

Sam Loudenslager
Arkansas Public Service Commission
1000 Center Street
Little Rock, AR 72203

Dean Evans
California Public Service Commission
505 Van Ness Avenue
San Francisco, CA 94102

Brenda Buchanan
Florida Public Service Commission
Fletcher Building
101 East Gaines St.
Tallahassee, FL 32399-0850

Elton Calder
Georgia Public Service Commission
162 State Office Bldg.
244 Washington Street, S.W.
Atlanta, GA 30334

Mark Jamison
Iowa Utilities Board
Lucas State Office Bldg.
Des Moines, IA 50319

Joel B. Shifman
Maine Public Utilities Commission
State House Station #18
Augusta, ME 04333

Ann Dean
Maryland Public Service Commission
American Building
231 East Baltimore Street
Baltimore, MD 21202-3486

Paul Pederson
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Michael Gallagher
New Jersey Board of Public Utilities
2 Gateway Center
Newark, N.J. 07102

Fred Sistarenik
New York Public Service Commission
3 Empire State Plaza
Albany, N.Y. 12223

Mary Steel
North Carolina Utilites Commission
Box 29510
Raleigh, N.C. 27626-0510

Rowland Curry
Texas Public Utility Commission
7800 Shoal Creek Blvd., Suite 400N
Austin, TX 78757

Teresa Ralston
Washington Utilities and
Transportation Commission
Chandler Plaza Building
1300 South Evergreen Park Dr., S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Jay Atkinson
Chief, Cost Accounting Branch
Accounting & Audits Division
Common Carrier Bureau
Federal Communications Commission
2000 L Street, N.W.,
Room 812, Stop 1600E5
Washington, D.C. 20554

Deborah Dupont
Accounting & Audits Division
Common Carrier Bureau
Federal Communications Commission

2000 L Street, N.W.,
Room 257, Stop 1600E2
Washington, D.C. 20554

Charles Needy
Accounting & Audits Division
Common Carrier Bureau
Federal Communications Commission
2000 L Street, N.W.,
Room 257, Stop 1600E5
Washington, D.C. 20554

Robert Loube
Public Service Commission of
the District of Columbia
450 Fifth St., N.W.
Washington, D.C. 20001

Charles Gray
National Association of
Regulatory Utility Commissioners
1102 ICC Building
Constitution Ave. & 12th St., N.W.
P.O. Box 684
Washington, D.C. 20044

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Report and Order on Expanded Interconnection with Local Telephone Companies (CC Docket No. 91-141);
Second Notice of Proposed Rulemaking on Expanded Interconnection with Local Telephone Companies (CC Docket No. 80-286); and
Report and Order on Transport Rate Structure and Pricing (CC Docket No. 91-213)

The three actions we take today -- implementation of expanded interconnection for special access, a proposal to implement expanded interconnection for switched access, and adoption of a new transport rate structure and prices -- cover some of the most important, complex and controversial issues this Commissioner has ever tackled. The questions presented are intricate, difficult to grasp and not susceptible to "quick fixes." Yet, from a consumer's perspective the basic result of the decisions is amazingly straightforward: rates for special access and switched transport services will decrease as competition increases.

I have been vigilant throughout these proceedings to ensure that in our efforts to stimulate the development of competition we have also given proper weight to the legitimate concerns of existing carriers and existing customers. An example of this balancing process is evident in the Special Access Expanded Interconnection Order. Upon concluding that the public interest is best served by a collocation policy, we simultaneously revised our rules to allow local exchange carriers to revise their special access prices so that they would not be hamstrung from competing with alternative access carriers. Similarly, in the transport proceeding, on the one hand we implement an interim rate structure that avoids immediate, excessive rate impacts on the smaller interexchange carriers, while on the other, we eliminate the equal charge per minute of use pricing structure, thus ensuring that the LECs can better meet the needs of the larger interexchange carriers.

The Further Notices we adopt today provide concrete evidence that our work has just begun. A final permanent transport rate structure and pricing plan have yet to be developed because we appreciate the need to move cautiously in this new competitive environment. In addition, the questions we ask about adopting expanded interconnection for switched transport are more complex

and controversial in their potential effect on local customers than those we addressed in the special access environment.

I am confident, however, that the record developed in both proceedings will provide significant guidance to the Commission as we further pursue our goals of increased competition, lower rates for consumers and continued high quality service. I can not emphasize enough the importance a well-developed record plays in proceedings of this magnitude and I urge all interested parties to devote whatever time and resources are necessary to assist us in our efforts.

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STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Expanded Interconnection with Local Telephone Company Facilities; Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board

I support this companion NPRM seeking comments on the proposal to require LECs to offer expanded interconnection for interstate switched transport under similar terms and conditions in the companion Special Access Expanded Interconnection Order. This item seeks comments on what type of architecture, availability, and pricing standards should apply.

The item also seeks comments on the important questions of allowing LECs with operational expanded interconnection arrangements additional pricing flexibility. In particular, the item seeks comments on allowing the LECs to price their transport offering using a system of density pricing zones similar to the pricing flexibility adopted in the companion Special Access Expanded Interconnection Order. I also look forward to comments on whether LECs with operational interconnection arrangements should be able to implement volume and term discounts for switched transport. I recognize that the implementation of expanded interconnection for switched transport could significantly increase the competition faced by the LECs in the provision of access services. I am, therefore, interested in parties' comments on whether the type of switched transport pricing flexibility proposed in this item is sufficient to ensure that LECs are able to respond adequately to increased competition.

I also recognize that the issues surrounding expanded interconnection for interstate switched transport are potentially more difficult than those associated with special access expanded interconnection. Increased competition could bring greater pressure on support flows in the LECs' current rate structures and pricing for switched services. I, therefore, look forward to parties' comments on the public policy effects of existing support flows and possible measures for mitigating any anticipated hardships due to pressures on these support flows.

I am also aware that our current separations procedures do not specifically contemplate the provision of expanded interconnection. I am, therefore, fully supportive of the items recommendation to convene the Federal-State Joint Board to determine whether separation changes are necessary in light of special access expanded interconnection to ensure a reasonable jurisdictional allocation. I look forward to the parties' recommendations on this important issue.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
CICI, INC.
GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED
IT&E OVERSEAS, INC.
MCI INTERNATIONAL, INC.
SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
TRT/FTC COMMUNICATIONS, INC.

File No. I-T-C-92-179

Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable Network Between and Among the United States Mainland, the State of Hawaii, the Island of Guam and Japan

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: November 12, 1992; Released: November 27, 1992

By the Chief, Common Carrier Bureau:

1. The above-captioned Joint Application[1] was filed on June 4, 1992, by American Telephone and Telegraph Company ("AT&T"), CICI, Inc., d/b/a IDB International ("IDB"), GTE Hawaiian Telephone Company, Incorporated ("HTC"), IT&E Overseas, Inc. ("IT&E"), MCI International, Inc. ("MCII"), Sprint Communications Company Limited Partnership ("Sprint"), TRT/FTC Communications, Inc. ("TRT/FTC"), (hereinafter collectively called the Joint Applicants). The Joint Applicants seek authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 (1982), to construct and operate a high capacity digital submarine cable network, known as TPC-5, extending between and among the United States Mainland, Keawaula in the State of Hawaii, the Island of Guam, and Japan. TPC-5 will be jointly owned by the Joint Applicants and 37 foreign telecommunications administrations and carriers. The Joint Applicants propose that TPC-5 be operational by December 31, 1996.

2. The Joint Applicants also seek authority to: (a) acquire capacity in TPC-5; (b) acquire, by lease or on an Indefeasible Right of User (IRU) basis, such extension facilities as may be required to extend capacity in TPC-5; (c) convey to its correspondents, or to non-owners, half interests on an IRU basis in certain capacity currently wholly assigned to a Joint Applicant; and (d) activate and operate capacity in TPC-5 and in the aforementioned facilities for the provision of their respectively authorized telecommunications services.

3. The Joint Application was placed on public notice on June 10, 1992. STC Submarine Systems Inc. ("STC") filed comments requesting the Commission to condition the requested Section 214 authorization and accompanying cable landing license.[2] The Joint Applicants[3] filed a Reply to which STC subsequently responded.

I. THE APPLICATION

4. The Joint Applicants will use TPC-5 to supplement their existing facilities for providing international and domestic service.[4] TPC-5 capacity will be extended by suitable facilities to the borders of other TPC-5 participating countries or to the terminals of other international communications systems, including other cable terminals and satellite earth stations, resulting in services between and among the U.S. Mainland, Hawaii, Guam and Japan.

5. The TPC-5 Construction and Maintenance Agreement (C&MA),[5] initialed on February 6, 1992, defines the proposed cable system in terms of segments for ownership purposes. TPC-5 will consist of twelve segments.[6] Each cable segment of TPC-5 will consist of two fiber pairs. One fiber pair will be used for service while the other will be used for restoration. The "loop" configuration of TPC-5, along with a fully redundant restoration pair, provides 100 percent fiber-on-fiber restoration and route diversity within the network, resulting in a much higher circuit reliability. The TPC-5 operating capacity of 4.8 Gigabits per second (Gbit/s) for each fiber pair, service and restoration, consists of 32 Basic System Modules (BSM) operating at 155 Megabits per second (Mbit/s), with each BSM consisting of

[1] The Joint Applicants supplement their Section 214 Application by filing individual circuit activation figures under separate cover and under a request for confidentiality pursuant to Sections 0.457 and 0.459 of the Commission's Rules.

[2] *See* File No. SCL-92-005.

[3] Sprint and MCII did not join in this Reply. *See* Reply at 1.

[4] Initially, all Joint Applicants may not be certified to serve directly all territories which the facilities covered by the Joint Application are capable of serving. Each individual applicant proposing extension into such territories by means of the TPC-5 facilities will be required to seek appropriate authority as may be required.

[5] *See* Attachment B to the Joint Application (filed, June 1, 1992).

[6] Segments A, B, C, D, E, and F are, respectively, the cable stations at Coos Bay, Oregon (U.S.), San Luis Obispo, California (U.S), Keawaula, Hawaii (U.S.), Tumon Bay, Guam (U.S.), Miyazaki and Ninomiya, Japan. Segment G consists of the

63 Minimum Investment Units (MIUs).[7] The Design Capacity per fiber pair is 2,016 MIUs. For voice services, digital circuit multiplication equipment (DCME) can be employed to derive about 150 virtual voice paths from a MIU, for a per fiber pair capacity of over 300,000 virtual voice paths. The Joint Applicants also state that TPC-5's new lightwave amplification repeaters will deploy the latest in digital lightwave technology in the Pacific Ocean Region (POR) and will provide users with an ever widening range of technological alternatives and services.

6. The estimated total cost of TPC-5 is $1,348 million. The Joint Applicants' share of costs is $705.6 million, which will be allocated proportionally to each U.S. owner, by segment, based on their percentage ownership interest in each segment contained in Schedule B of the C&MA. The estimated costs include neither the U.S. carriers' cost for interest during construction, currently projected at $229 million for the network, nor the cost of DCME, which is not considered part of the cable network. Fixed costs (95%) include the submarine cable, the repeaters, the terminal transmission equipment and the high voltage power plant. Suppliers' cost-incurred items (5%) include the costs associated with cable laying, route survey, plowing and burial of the cable, project management, owners' inspection and amounts payable for customs duties and value-added taxes.

7. The Joint Applicants' collective voting interest in TPC-5 is 50.65 percent, with ownership interests in Segments G, H, I and J divided principally between AT&T and KDD.[8] Segments T1 and T2 will be owned by AT&T and KDD respectively.[9] The allocation of capital and operating and maintenance costs of Segments A - J, T1, and T2 are shared by the Joint Applicants, with AT&T's share at 34 percent and KDD's at 14 percent.[10] The Joint Applicants also show capacity assigned to each of the owners upon which the costs are based.[11] These capacity assignments, based on forecasted demand through 2010, contemplate each Joint Applicant's proposed utilization of DCME. The Joint Applicants note that current capacity assignments reflect 52 percent of Design Capacity. Both prior and subsequent to the Network Ready for Service (RFS) date, December 31, 1996, carriers, including non-owners of TPC-5, may acquire TPC-5 capacity by IRU, lease or other mutually agreed upon arrangements.[12]

8. The Joint Applicants state that AT&T and KDD will likely supply portions of TPC-5. Contracts are being negotiated for AT&T to supply Segments G, H, T1 and approximately one half of Segment J, and for KDD to supply Segments I and T2 and approximately one-half of Segment J. The Joint Applicants expect that a multitude of United States subcontractors located through out the country will participate in the construction or provision of materials for the project.[13]

9. In addition, the Joint Applicants note that portions of the TPC-5 cable will use AT&T's latest SL2000 technology, which relies on digital lightwave amplification technology and dispersion shifted optical fiber that will increase capacity and reliability of previous submarine technology. The network interface equipment will also employ the STM-1 CCITT Synchronous Digital Hierarchy (SDH) standard that will further enhance monitoring and reliability, as well as interoperability. The Joint Applicants add that TPC-5's network reliability is enhanced by the use of this innovative technology. Since the SL2000 technology uses optically amplified repeaters that have been designed with far fewer active components than regenerative repeaters, the likelihood and number of component malfunctions is minimized. Furthermore, TPC-5 introduces innovative self-healing (self-restoration) technology which ensures 100 percent digital fiber optic reliability for TPC-5. Moreover, TPC-5's fully redundant restoration fiber pair can serve as an alternative restoration source for submarine cable systems in the POR in the event of an outage.

10. The Joint Applicants state that the placing into service of TPC-5 is expected to be followed by a rapid growth of reliable, secure and economically priced telecommunications services based upon digital lightwave technology. In addition, the Joint Applicants state that TPC-5 will provide the third common carrier fiber optic submarine cable directly linking the U.S. Mainland and Hawaii, and the second common carrier fiber optic submarine cable directly linking the U.S. Mainland and Japan. With a transpacific capacity of 2,016 MIUs per fiber pair, the Joint Applicants state that TPC-5 is a significant part of the common carrier network designed for the POR. Furthermore, they note that TPC-5 will provide additional digital connectivity to the existing and planned HAW-4/TPC-3, HAW-5, TPC-4, G-P-T, H-J-K, PacRimEast, PacRimWest and TASMAN-2 Cable Systems and introduce a new level

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whole submarine cable provided between and including the Network Interfaces at Segments B and C. Segment H consists of the whole submarine cable provided between and including the Network Interfaces at Segments C and D. Segment I consists of the whole submarine cable and Network Interfaces provided between and including Segments D and E. Segment J consists of the whole submarine cable and Network Interfaces between Segments F and A. Segment T1 consists of the whole submarine cable and Network Interfaces between and including Segments A and B. Segment T2 consists of the whole submarine cable and Network Interfaces provided between and including Segments E and F. AT&T will own and the other parties will have IRU interests in Segments A, B, C, D, and T1; Kokusai Denshin Denwa Co., Ltd. (KDD) will own and other parties will have IRU interests in Segments E, F, and T2. (*See* Attachment A).

[7] A MIU is a 2.048 Mbit/s digital stream jointly assigned between two parties or wholly assigned to a party which is used for purposes of ownership allocation.

[8] *See* Appendix 1 (Schedule B of the C&MA) and Appendix 2 (Schedule C of the C&MA). For the purposes of this agreement, Transpacific shall be assigned all of AT&T's interests in the TPC-5 Cable Network within Japan, including its territorial waters, and will be responsible for the capital, operating, and maintenance costs of 34.47 percent of segments I and J within Japan, including its territorial waters.

[9] *See* Appendix 3 (Schedule D of the C&MA) which shows IRU interests in Segments T1 and T2.

[10] *See* Appendix 4 (Schedule E of the C&MA).

[11] *See* Appendix 5A, 5B, 5C, 5D, 5E, 5F, and 5G (Schedule F, G-1, G-2, G-3, G-4, G-5, and G-6, respectively). The interests assigned represent the total Assigned Capacity and the remaining capacity between Assigned Capacity and Design Capacity is referred to as "unassigned capacity."

[12] However, prior to the RFS date, capacity may also be acquired on an ownership basis.

[13] Specifically, 60-65 subcontractors located in more than 15 states will participate in the construction or provision of components or material for the construction of TPC-5. *See* AT&T Supplemental Filing, dated October 13, 1992.

of restoration capability to submarine cable facilities in the POR as a result of its unique loop configuration with a completely redundant restoration fiber pair. Moreover, the Joint Applicants note that TPC-5 will allow digital restoration for other cable systems in the POR and will significantly increase the number of transmission paths across the Pacific Ocean, thereby enhancing service reliability. Finally, path diversity among the U.S. Mainland, Hawaii, Guam and Japan will be enhanced by the additional facility at Coos Bay, Oregon.

II. DISCUSSION

11. The Joint Applicants seek authority to construct and operate TPC-5 to begin service in late 1996 to meet their telecommunications capacity needs and those of their correspondents in the POR during the 1996-2010 time frame. We have reviewed the Joint Application under the public convenience and necessity standard of Section 214 of the Communications Act of 1934, as amended, and conclude that implementation of TPC-5 in 1996 will serve the public interest. Accordingly we grant the Joint Application subject to certain conditions.[14]

A. The Need for the TPC-5 Cable Network

12. Section 214 of the Communications Act requires that the Commission make a finding that the public convenience and necessity will be served by authorization of the facilities requested in the Joint Application by determining "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[15] In making this determination, we traditionally have considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[16]

1. Demand, Capacity and Demand Flexibility

13. We conclude that projected circuit demand, along with other factors, supports the construction and operation of TPC-5 to meet the telecommunications needs of the Joint Applicants and their correspondents in the POR during the 1996-2010 time frame. The circuit demand data for TPC-5, provided by the Joint Applicants under a confidential cover, forecasts the number of 64 Kbit/s bearer circuits to be activated during the period of 1996 through 2000.[17] Based on these forecasts, we find that existing digital submarine cable systems in the POR (TPC-3 and TPC-4) will be unable to meet the Joint Applicants' circuit demands within the first three years of TPC-5's operation. According to the Joint Applicants' forecasted requirements, their demand for TPC-5 cable circuits in 1998 will be 23,998 Minimum Assignable Units of Ownership (MAUOs) which exceeds the total Design Capacity of TPC-3 and TPC-4 combined.[18] The Joint Applicants' forecasts suggest that demand by the year 2000 will be 31,695 MAUOs, well in excess of capacity of existing digital cable systems in the POR, and 52.4 percent utilization of TPC-5's capacity. Furthermore, we traditionally have recognized a need to ensure sufficient demand flexibility to avoid service disruptions caused by saturated facilities.[19]

14. We recognize that there are uncertainties inherent in long-range traffic projections,[20] but new technology that increases capacity, reliability and quality is likely to spur demand for new digitized services and could very well stimulate circuit demand beyond the Joint Applicants' projected traffic forecasts. Circuit costs of TPC-5 will be lower than previous cable systems[21] which should exert beneficial downward pressure on the rates for international circuitry as well as stimulate increased demand. Moreover, TPC-5's self-healing technology will also make it more attractive to customers with specific requirements for fiber optic cable facilities for data transmission and who prefer to have similar facilities for restoration in the event of an outage. These factors should also stimulate user demand since, in addition to the need for raw transmission capacity, user demand is similarly determined by user requirements for digital technology, route and media diversity, advanced digital cable restoration capabilities, security and cost-effectiveness.[22] In light of the above and the new technology introduced by this cable network, we conclude TPC-5 is justified.

2. Quality of Service

15. *Media and Route Diversity.* Media diversity enhances service reliability through the use of more than one transmission medium, satellite or cable, to carry a correspondent's traffic. Like media diversity, route diversity enhances service reliability by increasing the number of independent routes that carry traffic to a given location. As a rule, the more independent routes serving a given location, the greater the ability to restore one that fails.

16. We conclude that the introduction of TPC-5 as proposed will enhance media and route diversity by adding another independent cable route. Service reliability would be substantially improved since the number of circuits affected by a service interruption on a particular route or routes would be minimized and the ability to restore service via another cable facility would be enhanced. TPC-5 is designed to operate as part of an integrated common car-

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[14] In a separate companion order, we also grant the Joint Applicants' request for a cable landing license (File No. S-C-L-92-005) pursuant to the Cable Landing License Act.

[15] *See AT&T et al., (TAT-7 Order)*, 73 FCC 2d 248, 256 (1979).

[16] *See, e.g., AT&T et al.* 4 FCC Rcd 1129, 1131 (Com. Car. Bur. 1988) (*TAT-9 Order*). *See also Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981-1985 (POR Planning)* , 102 FCC 2d 353, 355 (1985) and *North Atlantic Facilities Planning*, 3 FCC Rcd 3979, 3986 (1988); *All America Cable and Radio Inc., et. al.*, 67 FCC 2d 451, 469 (1978).

[17] The Joint Applicants' aggregate demand forecast for TPC-5 from 1996-2000 is 16,508, 20,456, 23,998, 27,798 and 31,695 MAUOs respectively.

[18] The total design capacity of TPC-3 is 7,560 MAUOs, while TPC-4 has a total design capacity of 15,120 MAUOs, for a total combined capacity of 22,680 MAUOs in the POR. *See AT&T et. al.*, Memorandum Opinion, Order and Authorization, File No. I-T-C-85-219, released January 7, 1986 (mimeo 1794) (*TPC-3 Decision*); *AT&T et. al.*, 4 FCC Rcd 8046 (1989) (*TPC-4 Decision*).

[19] As in the *TAT-8 Decision*, we have focused on a 20 percent demand flexibility (*i.e.*, the ability to accommodate a circuit demand 20 percent larger than that forecast) as a reasonable measure of adequate demand flexibility.

[20] *See American Telephone & Telegraph Co., et. al.*, 98 FCC 2d 440, 467 (1984) (*TAT-8 Decision*).

[21] *See infra* para. 20.

[22] *American Telephone & Telegraph Co. et. al.*, 7 FCC Rcd 445 (1992) (*TAT-10 Decision*)

rier digital facilities network in the POR. It will provide critical digital interconnection with HAW-3/TPC-2, HAW-4/TPC-3, TPC-4, G-P-T, H-J-K, AZCAN, ASEAN, OLUHO, OKITAI, NPC, TAIGU, TAILU and TASMAN-2 and will provide future interconnection with HAW-5, PacRimEast and PacRimWest cable systems. It will also provide additional direct submarine links between the U.S. Mainland, Hawaii, Guam and Japan.

17. *Restoration.* Restoration pertains to the ability to maintain service in the event of a facility outage. TPC-5 offers a unique self-healing fiber-on-fiber restoration system that provides consumers with 100 percent restoration capability for TPC-5 in the event of an outage. Although the Commission has previously recognized that satellite capacity provides a satisfactory restoration alternative for cable, we also have recognized that absolute reliance on satellite facilities to meet restoration needs and increased demand may not be in the best interests of users that may have specific communications requirements better accommodated by fiber optic cable facilities.[23] TPC-5's self-healing (self-restoration) design is facilitated by the ring or loop architecture of the cable network which, in the event of an outage in one segment, enables traffic to be instantaneously re-routed to the appropriate segment of the restoration fiber pair with no discernable difference in transmission quality. This fast switching capability is made possible by the use of SDH technology which provides a standard interface that will permit flexible drop-insert multiplexing capabilities and cross-connect functions that should simplify multiplexing and demultiplexing.

18. The new SDH technology and fully redundant fiber pair introduced by TPC-5 reduces the Joint Applicants' reliance on existing cable and satellite facilities for restoration in the event of a failure of a TPC-5 segment, which is particularly important as TPC-5's own Design Capacity could not be restored by existing cable or satellite technology. The self-healing feature is also significant since reliance on existing cable or satellite facilities as a restoration alternative is subject to the availability of circuits.

3. Cost Analysis

19. The Joint Applicants estimate the total cost of TPC-5 to be $1.348 billion, with their share projected to be $705.6 million. The estimated original capital cost of a 64-Kilobits per second (Kbit/s) half channel (half-MAUO), based on the levels subscribed at the first Data Gathering Meeting, is approximately $3,000 for a Guam-Japan Circuit, $11,900 for a U.S. Mainland-Hawaii-Guam circuit and $9,000 for U.S. Mainland-Japan circuit. The Joint Applicants note that the unit cost of a virtual voice path in TPC-5 will be further reduced through the use of digital circuit multiplication technology, which can derive nominally 150 virtual voice channels from a MIU (30 MAUOs). A comparison of the costs for previously authorized digital cable facilities in the POR demonstrates that TPC-5 will continue the trend of providing increased capacity while reducing per circuit costs. For example, the cost of a half-MAUO on a fully subscribed TPC-4 Japan - U.S. Mainland segment was $11,545 and a half-MAUO on HAW-4/TPC-3 was $40,000. The estimated cost for a half-MAUO on a fully subscribed TPC-5 is $4,900 for a U.S. Mainland-Japan circuit, and $8,000 for a U.S. Mainland-Hawaii-Guam-Japan circuit.

4. Technological Innovations

20. In addition to demand, it is necessary to consider factors such as promoting the development and rapid implementation of new technologies and service quality in determining the timing of the introduction of new facilities. The Commission has a long standing policy of favoring the development and rapid implementation of new technologies.[24] The proposed TPC-5 Cable Network will introduce significant technological developments into the submarine cable field which in turn will provide substantial benefits to users. Portions of the TPC-5 cable will use AT&T's latest SL2000 technology, which is based on a unique packaging of components and technology using, for the first time, optically amplified bit-rate insensitive repeaters, bit-rate sensitive terminal equipment, and dispersion-shifted fiber in a submarine cable system.[25] As the Joint Applicants noted, the optically amplified repeaters have been designed with far fewer active components than regenerative repeaters and as a result the likelihood and number of component malfunctions is minimized. Use of these repeaters and other components will permit a fiber pair in TPC-5 to operate at 4.8 Gbit/s, resulting in the operating fiber pair being capable of providing 60,480 MAUOs. This is eight times the capacity provided by TPC-4 which operates at 565 Mbit/s and provides 7,560 MAUOs per fiber pair.[26] The new technology for use in TPC-5 will also significantly reduce the cost per MAUO. The cost per half-MAUO on the direct U.S. Mainland to Japan route over TPC-5, when the cable is fully utilized, is projected to be $4,900 -- less than half of the $11,545 cost per half-MAUO for the direct U.S. Mainland to Japan route on TPC-4.

5. Competition Considerations

21. *Intermodal and Intramodal Competition.* We find that the introduction of TPC-5 will enhance intramodal competition in the POR and encourage both private and common carrier cable operators to innovate and price their

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[23] *See North American Facilities Planning*, 3 FCC Rcd at 3987.

[24] *ITT Cable and Radio, Inc.*, 5 FCC 2d 823, 831 (1965). The Commission noted that the technological innovations of the proposed submarine cable system would provide more than five times the circuit capacity of previous cables and would lower per circuit costs, finding that "...orderly and continuing progress in cable technology and its application as an alternative means of providing overseas communications service is in the public interest." In our *TAT-8 Decision*, we found that demand did not justify placing the cable in service, however, we concluded that the introduction of the new fiber technology and other factors warranted authorizing TAT-8. *See TAT-8 Decision*, 98 FCC 2d, at 467 and *Policies for Overseas Common Carriers*, 84 FCC 2d 760, 767-768, (1981).

[25] Dispersion Shifted Fiber is a single mode fiber optimized for operation with optical amplifier systems in the 1550 nm wavelength region. This fiber differs from standard single mode fiber in that the optical characteristics of the fiber are modified so the minimal pulse spreading or dispersion occurs in the 1550 nm wavelength region rather than in the 1300 nm region. The combination of minimum dispersion and minimum loss maximize the information carrying capacity of the optical transmission systems operating in the 1550 nm region.

[26] TPC-4 utilizes two working fiber pairs to provide a total of 15,120 MAUOs.

offerings in a manner that is calculated to attract and retain customers. We also find that the introduction of TPC-5 will increase intermodal competition with INTELSAT and potential separate satellite system providers, spurring existing providers of both cable and satellite capacity to respond competitively. Such competition will give service providers and other users greater choice in selecting facilities and thus will enable them to maintain, or improve and enhance, the economy and efficiency of their operations. The opportunity to choose among a range of facilities further allows service providers to be more responsive to customer needs in terms of price, service quality, and service availability.

22. *Competitive Procurement.* While expressly supporting the construction of TPC-5, STC requests the Commission to condition approval of the Section 214 authorization and accompanying cable landing license, as it did in the *Pacific Telecom Cable* order (PTC),[27] by requiring the Joint Applicants to use a fair and open procurement process in awarding the construction contracts for TPC-5. STC claims that such a procurement process has not been used by the Joint Applicants since the procurement of the cable system has been apparently predetermined, with construction to be split between AT&T and KDD. STC asserts that the proposed new technology is not uniquely available from AT&T and that STC, along with other suppliers of systems and component parts, could offer compatible technology. STC also argues that a fair and open procurement process would ensure that consumers will gain the full benefits of competition, such as the lowest cost, most advanced features and the highest quality and reliability, in the supply of communications services and in the construction of the underlying facilities. STC also notes that open procurement reinforces the U.S. government's efforts to open telecommunications markets world wide.

23. Although STC cites *Pacific Telecom Cable* as precedent for its request that we condition this Section 214 authorization and the accompanying cable landing license, we note that PTC involved only a cable landing license for the North Pacific Cable (NPC), a non-common carrier submarine cable. We have never imposed conditions on procurement practices in a Section 214 authorization. With respect to STC's reference to PTC, the Commission did authorize only a conditional grant of PTC's cable landing license. In that instance, the Commission had specific concerns that foreign interests would be favored over U.S. interests due to the actual foreign ownership of the U.S. end, as well as the potential common foreign ownership of both the U.S. and foreign end, of NPC. Due to those particular concerns, we found it necessary to condition the cable landing license upon PTC's demonstrating that "U.S. entities will be provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable."

24. We believe that the Joint Applicants demonstrate that qualified suppliers will be afforded a reasonable opportunity to participate in the procurement of TPC-5. In this instance, although AT&T technology will be used for the U.S. portion of TPC-5, AT&T will not acquire the cable on a sole source, non-competitive basis. As the Joint Applicants state, the U.S.-supplied segments of TPC-5 will employ approximately 60-65 subcontractors located in more than 15 states to provide components or materials for the construction of TPC-5; moreover, each of these subcontractors will also engage suppliers for components or materials, so that the number of companies affected by the construction of TPC-5 will be considerably greater than the number of immediate subcontractors.[28] Furthermore, under price caps regulation, AT&T has the incentive to subcontract with those suppliers that offer a competitive price. Moreover, we believe that the presence of competing cable facilities in the POR, including NPC, will continue to serve as a strong incentive for efficient procurement. As we decided in TPC-4, given these competitive market circumstances, we can find no public interest benefit for involving the Commission in the management of TPC-5 procurement decisions, and we do not believe that it is necessary to condition the grant of TPC-5 on assurances of competitive procurement practices.[29]

6. International Comity

25. Forty-four telecommunications administrations and entities from thirty-one foreign locations have agreed that the TPC-5 system design and 1996 service date will meet the projected service needs of their customers. Thus, we conclude that TPC-5 will promote international comity.

B. The Effect of Price Caps Regulation

26. In our *TPC-4 Decision*, we stated that the price caps system of regulation is a disincentive for carriers to engage in the construction of unnecessary facilities since the burden of such investment would fall on stockholders and not ratepayers.[30] Having determined that there is a need for the introduction of the TPC-5 Cable Network in late 1996, we believe that the price caps system of regulation provides added protection against unnecessary investment. We also note that current competitive conditions and regulatory approaches provide those Joint Applicants not subject to price caps regulation with the incentive to make rational economic decisions and not engage in unnecessary construction of facilities.[31] In particular, the Commission recognizes that any such unnecessary investment by Joint Applicants not subject to price cap regulation requires them to have the ability to raise rates to recoup such investment. As a result, those Joint Applicants not subject to price caps that raise rates above those set by the marketplace to recover imprudent investments risk the loss of potential customers.[32]

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[27] *Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686 (1987) (Conditional license), 4 FCC Rcd 8061 (1989) (Final license).

[28] The Joint Applicants assert that TPC-5 will benefit the U.S. economy generally and the U.S. submarine cable industry specifically by promoting a leadership role for U.S. industry in lightwave technology, ensuring that the U.S. submarine cable industry is a viable competitor in the global market.

[29] *See TPC-4 Decision*, 4 FCC Rcd at 8046. The Commission came to the same conclusion in response to similar comments filed by STC following the public notice of TPC-4.

[30] *Id.* at 8045.

[31] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (*Price Caps Order*).

[32] *See International Competitive Carrier Policies*, 102 F.C.C. 2d 812, 829 (1985) (*International Competitive Carrier*); *recon. denied*, 60 RR 2d 1435 (1986); *US Sprint Communications Company Limited Partnership*, 4 FCC Rcd 6279, 6284 (Com. Car. Bur. 1989).

CONCLUSION AND ORDERING CLAUSES

27. In view of the foregoing, we find that the present and future public convenience and necessity require the construction of the TPC-5 Cable Network, to become operational in December 1996.

28. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[33] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

29. Accordingly, IT IS ORDERED that, pursuant to Section 214, 47 U.S.C. §214 (1982), application File No. I-T-C-92-179 of the Joint Applicants (AT&T, IDB, HTC, IT&E, MCII, Sprint and TRT/FTC) IS GRANTED, subject to the following terms, conditions, and limitations, and the Applicants are authorized to:

(a) participate in the construction and operation of the TPC-5 Cable Network as proposed herein;

(b) acquire and activate capacity in the TPC-5 Cable Network, on an ownership basis, in accordance with the interest indicated in Appendix 5;

(c) acquire capacity, by lease, in such domestic connecting facilities as may be required to extend capacity in the TPC-5 Cable Network;

(d) utilize digital circuit multiplication equipment to derive additional voice paths from the circuits (MIUs) authorized herein, in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in the TPC-5 Cable Network and aforementioned extension facilities for the provision of the Applicants' authorized telecommunications services.

30. IT IS FURTHER ORDERED that Applicants, other than AT&T, are authorized to acquire, by lease, appropriate connecting facilities between the Coos Bay, Oregon and San Louis Obispo, California cable stations and their respective operating offices in the United States.

31. IT IS FURTHER ORDERED that the Joint Applicants' tariffs must state that its customers may not resell international private lines or connect them to the public switched network for the provision of international basic telecommunications services, unless authorized to do so by the Commission upon a country-specific finding of resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II*, First Report and Order, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending.*

32. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in TPC-5 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

33. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interest in capacity herein authorized, as the public interest may require, to accommodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and further, jurisdiction is retained by the Commission over all matters relating to the Joint Applicant's ownership, management, maintenance and operation of the cable network as authorized herein to ensure the most efficient use not only of this cable network but of all means of communications between the U.S. and the Pacific Ocean Region.

34. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCME multiplexing and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

35. IT IS FURTHER ORDERED that no Joint Applicant herein that is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107[34] shall either dispose of any interest in TPC-5 capacity it is authorized to acquire to any entity on an ownership basis or dispose of any interest in any such capacity in any way to a non-U.S. telecommunications service provider without prior authorization by the Commission.

36. IT IS FURTHER ORDERED that the Joint Applicants shall include TPC-5 facility use in the monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

37. IT IS FURTHER ORDERED that STC's request to condition the Section 214 authorization of TPC-5 is hereby denied.

38. This order is issued under Section 0.291 of the Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[33] *See* File No. I-T-C-92-179, at p. 23.
[34] *See International Competitive Carrier*, at 822.

APPENDIX 1
SCHEDULE B

INVESTMENT SHARES AND VOTING INTERESTS IN THE TPC-5 CABLE NETWORK

PARTIES	PERCENT
APTT (Austria)	0.02826
AT&T	34.46616
BT (U.K)	1.10501
BTE (Ireland)	0.23503
CPRM (Portugal)	0.02826
DACOM (Korea)	1.39406
DBP (Germany)	1.66034
DGT (China)	0.76709
ENTEL (Peru)	0.05651
ETPI (Philippines)	0.02826
FT (France)	0.75263
HKTI (Hong Kong)	1.70173
HTC	1.42398
IDB	0.19780
IDC (Japan)	4.31816
INDOSAT (Indonesia)	0.15076
IT&E	0.08394
ITALCABLE (Italy)	0.50314
ITDC (Taiwan)	2.15052
ITJ (Japan)	6.56775
KDD (Japan)	14.97186
KT (Korea)	3.88483
LPT (Luxembourg)	0.02826
MCII	8.00569
MCL (U.K.)	1.45723
NPTT (Netherlands)	0.14128
NT (Norway)	0.02826
OTC (Australia)	1.16352
PHILCOM (Philippines)	0.16273
PLDT (Philippines)	3.70349
RTT (Belgium)	0.32878
SFPT (Finland)	0.02826
SPTT (Switzerland)	0.32878
STA (Sweden)	0.02826
TAS (Singapore)	0.80150
TD (Denmark)	0.05651
TELEGLOBE (Canada)	0.07563
TELINTAR (Brazil)	0.02826
TELMEX (Mexico)	0.11303
TM (Malaysia)	0.45344
TNZI (New Zealand)	0.10365
TPTT (Turkey)	0.00947
TRT/FTC	0.39560
US SPRINT	6.06239
TOTAL	100.00000

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APPENDIX 2
SCHEDULE C

OWNERSHIP INTERESTS IN SEGMENTS G, H, I, AND J

PARTIES	PERCENT
APTT	0.02826
AT&T	34.46616
BT	1.10501
BTE	0.23503
CPRM	0.02826
DACOM	1.39406
DBP	1.66034
DGT	0.76709
ENTEL	0.05651
ETPI	0.02826
FT	0.75263
HKTI	1.70173
HTC	1.42398
IDB	0.19780
IDC	4.31816
INDOSAT	0.15076
IT&E	0.08394
ITALCABLE	0.50314
ITDC	2.15052
ITJ	6.56775
KDD	14.97186
KT	3.88483
LPT	0.02826
MCII	8.00569
MCL	1.45723
NPTT	0.14128
NT	0.02826
OTC	1.16352
PHILCOM	0.16273
PLDT	3.70349
RTT	0.32878
SFPT	0.02826
SPTT	0.32878
STA	0.02826
TAS	0.80150
TD	0.05651
TELEGLOBE	0.07563
TELINTAR	0.02826
TELMEX	0.11303
TM	0.45344
TNZI	0.10356
TPTT	0.00947
TRT/FTC	0.39580
US SPRINT	6.08239
TOTAL	100.00000

NOTE 1: For purposes of this Agreement, Transpacific shall be assigned all of the AT&T interests in the TPC-5 Cable Network within Japan including its territorial waters and shall be responsible for the capital, operating, and maintenance costs of 34.46616% of segments I and J within Japan, including its territorial waters.

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APPENDIX 3

SCHEDULE D

IRU INTERESTS IN SEGMENTS T1 AND T2

PARTIES	SEGMENT T1 PERCENTAGE	SEGMENT T2 PERCENTAGE
APTT	0.02826	0.02826
AT&T	* N.A. (NOTE 1)	34.46616
BT	1.10501	1.10501
BTE	0.23503	0.23503
CPRM	0.02826	0.02826
DACOM	1.39406	1.39406
DBP	1.66034	1.66034
DGT	0.76709	0.76709
ENTEL	0.05651	0.05651
ETPI	0.02826	0.02826
FT	0.75263	0.75263
HKTI	1.70173	1.70173
HTC	1.42396	1.42396
IDB	0.19780	0.19780
IDC	4.31816	4.31816
INDOSAT	0.15076	0.15076
IT&E	0.08394	0.08394
ITALCABLE	0.50314	0.50314
ITDC	2.15052	2.15052
ITJ	6.56775	6.56775
KDD	14.97186	* N.A. (NOTE 1)
KT	3.88483	3.88483
LPT	0.02826	0.02826
MCII	8.00569	8.00569
MCL	1.45723	1.45723
NPTT	0.14128	0.14128
NT	0.02826	0.02826
OTC	1.16352	1.16352
PHILCOM	0.16273	0.16273
PLDT	3.70349	3.70349
RTT	0.32878	0.32878
SFPT	0.02826	0.02826
SPTT	0.32878	0.32878
STA	0.02826	0.02826
TAS	0.80150	0.80150
TD	0.05651	0.05651
TELEGLOBE	0.07563	0.07563
TELINTAR	0.02826	0.02826
TELMEX	0.11303	0.11303
TM	0.45344	0.45344
TNZI	0.10356	0.10356
TPTT	0.00847	0.00847
TRT/FTC	0.39560	0.39560
US SPRINT	6.08239	6.08239

* – NOT APPLICABLE

NOTE 1: Segments T1 and T2 are owned by AT&T and KDD respectively. Other Parties have IRU interests in these segments as specified above.

NOTE 2: For purposes of this Agreement, Transpacific shall be assigned all of the AT&T interests in the TPC–5 Cable Network within Japan, including its territorial waters.

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APPENDIX 4
SCHEDULE E

ALLOCATION OF CAPITAL AND OPERATION AND MAINTENANCE COSTS OF SEGMENTS A, B, C, D, E, F, G, H, I, J, T1, AND T2

PARTIES	PERCENT
APTT	0.02826
AT&T	34.46616
BT	1.10501
BTE	0.23503
CPRM	0.02926
DACOM	1.39406
DBP	1.66034
DGT	0.76709
ENTEL	0.05651
ETPI	0.02826
FT	0.75263
HKTI	1.70173
HTC	1.42398
IDB	0.19780
IDC	4.31816
INDOSAT	0.15076
IT&E	0.08394
ITALCABLE	0.50314
ITDC	2.15052
ITJ	5.56775
KDD	14.97186
KT	3.88483
LPT	0.02826
MCII	8.00569
MCL	1.45723
NPTT	0.14128
NT	0.02826
OTC	1.16352
PHILCOM	0.16273
PLDT	3.70349
RTT	0.32878
SFPT	0.02826
SPTT	0.32878
STA	0.02826
TAS	0.80150
TD	0.05651
TELEGLOBE	0.07563
TELINTAR	0.02826
TELMEX	0.11303
TM	0.45344
TNI	0.10355
TPTT	0.00947
TRT/FTC	0.39560
US SPRINT	6.08239
TOTAL	100.00000

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APPENDIX 5A

SCHEDULE F

HALF MIU CAPACITY ASSIGNED BY PATH

KILOMETERS / PARTIES	USM-HA 4400	HA-GU 6800	GU-JA 2850	JA-USM 8500	USM-GU 11200	HA-JA 9650
APTT	0	0	0	1	0	0
AT&T	1008	1	0	411	212	6
BT	6	0	8	32	1	0
BTE	0	0	0	7	1	0
CPRM	0	0	0	1	0	0
DACOM	0	0	1	49	0	0
DBP	1	0	1	50	6	0
DGT	0	0	6	24	0	1
ENTEL	0	0	0	2	0	0
ETPI	0	0	0	1	0	0
FT	0	0	0	24	2	0
HKTI	0	1	2	10	37	0
HTC	16	25	6	0	0	18
IDB	0	0	0	7	0	0
IDC	0	0	40	136	0	3
INDOSAT	0	0	1	5	0	0
IT&E	0	0	1	0	2	0
ITALCABLE	1	0	1	13	3	0
ITDC	0	1	14	10	46	0
ITJ	0	0	39	208	0	10
KDD	0	0	40	496	0	18
KT	0	0	4	36	76	0
LPT	0	0	0	1	0	0
MCII	42	8	23	188	56	5
MCL	0	0	7	40	7	0
NPTT	0	0	0	5	0	0
NT	0	0	0	1	0	0
OTC	6	0	63	0	12	1
PHILCOM	0	1	3	0	3	0
PLDT	0	6	13	2	91	0
RTT	0	0	0	9	2	0
SFPT	0	0	0	1	0	0
SPTT	0	0	0	9	2	0
STA	0	0	0	1	0	0
TAS	0	1	4	17	7	0
TD	0	0	0	2	0	0
TELEGLOBE	0	0	5	1	0	0
TELINTAR	0	0	0	1	0	0
TELMEX	0	0	0	4	0	0
TM	0	0	3	6	6	1
TNZI	1	0	6	0	0	1
TPTT	0	0	1	0	0	0
TRT/FTC	0	0	0	14	0	0
US SPRINT	131	0	3	99	36	0
TOTAL	1212	44	284	1904	606	64

Note 1: The distance in kilometers of the Paths have been determined based on the cable length of the shortest route between the respective pair of the Nodes for the purpose of calculating the MIU-kilometers of the Parties. The distance of the Tie-Cable Segments will be excluded in the calculation of the MIU-kilometers.

29-Jan-92

APPENDIX 5B

SCHEDULE G1
U.S. MAINLAND – HAWAII

PATH ASSIGNMENT OF MIUS IN THE TPC5 NETWORK

JOINTLY ASSIGNED MIUS

PARTIES	OTC	TNZI	TOTAL
DBP	1	0	1
ITALCABLE	0	1	1
US SPRINT	5	0	5
TOTAL	6	1	7

WHOLLY ASSIGNED MIUS

PARTIES	
AT&T	504
BT	3
HTC	8
MCII	21
US SPRINT	63
TOTAL	599

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	HALF MIU INTERESTS
AT&T	0	504	1008
BT	0	3	6
DBP	1	0	1
HTC	0	8	16
ITALCABLE	1	0	1
MCII	0	21	42
OTC	6	0	6
TNZI	1	0	1
US SPRINT	5	63	131
TOTAL	14	599	1212

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APPENDIX 5C

SCHEDULE G2
HAWAII – GUAM

PATH ASSIGNMENT OF MIUS IN THE TPC5 NETWORK

JOINTLY ASSIGNED MIUS

PARTIES	HKTI	HTC	ITDC	PHILCOM	PLDT	TAS	TOTAL
AT&T	0	0	1	0	0	0	1
HTC	1	0	0	0	6	1	8
MCII	0	1	0	1	0	0	2
TOTAL	1	1	1	1	6	1	11

WHOLLY ASSIGNED MIUS

PARTIES	
HTC	6
MCII	3
TOTAL	11

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	HALF MIU INTERESTS
AT&T	1	0	1
HKTI	1	0	1
HTC	9	6	25
ITDC	1	0	1
MCII	2	3	8
PHILCOM	1	0	1
PLDT	6	0	6
TAS	1	0	1
TOTAL	22	11	44

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APPENDIX 5D

SCHEDULE G3
GUAM – JAPAN

PATH ASSIGNMENT OF MIUS IN THE TPCS NETWORK

JOINTLY ASSIGNED MIUS

PARTIES	DACOM	DGT	HKTI	IDC	INDOSAT	ITJ	KDD	KT	OTC	TOTAL
BT	0	0	0	0	0	0	0	0	8	8
DBP	0	0	0	0	0	0	0	0	1	1
HTC	0	0	0	2	0	1	2	0	0	5
IT&E	0	0	0	0	0	0	1	0	0	1
ITALCABLE	0	0	0	0	0	0	0	0	1	1
ITDC	0	0	0	2	0	4	6	1	1	14
MCII	0	0	0	5	0	2	7	1	8	23
MCL	0	0	0	0	0	0	0	0	7	7
OTC	1	5	2	3	1	1	11	2	0	26
PHILCOM	0	0	0	0	0	0	3	0	0	3
PLDT	0	0	0	5	0	5	3	0	0	13
TAS	0	0	0	2	0	2	0	0	0	4
TELEGLOBE	0	0	0	0	0	0	0	0	5	5
TM	0	0	0	0	0	1	0	0	2	3
TNZI	0	1	0	1	0	1	3	0	0	6
TPTT	0	0	0	0	0	0	0	0	1	1
US SPRINT	0	0	0	0	0	0	0	0	3	3
TOTAL	1	6	2	20	1	17	36	4	37	124

WHOLLY ASSIGNED MIUS

PARTIES	
IDC	10
ITJ	11
KDD	2
TOTAL	23

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	HALF MIU INTERESTS
BT	8	0	8
DACOM	1	0	1
DBP	1	0	1
DGT	6	0	6
HKTI	2	0	2
HTC	5	0	5
IDC	20	10	40
INDOSAT	1	0	1
IT&E	1	0	1
ITALCABLE	1	0	1
ITDC	14	0	14
ITJ	17	11	39
KDD	36	2	40
KT	4	0	4
MCII	23	0	23
MCL	7	0	7
OTC	63	0	63
PHILCOM	3	0	3
PLDT	13	0	13
TAS	4	0	4
TELEGLOBE	5	0	5
TM	3	0	3
TNZI	6	0	6
TPTT	1	0	1
US SPRINT	3	0	3
TOTAL	248	23	294

29-Jan-92

APPENDIX 5E

SCHEDULE 04
JAPAN - U.S MAINLAND

PATH ASSIGNMENT OF MIUS IN THE TPC8 NETWORK

JOINTLY ASSIGNED MIUS

PARTIES	DACOM	DGT	ETPI	HKTI	IDC	INDOSAT	ITDC	ITJ	KDD	KT	PLDT	TAB	TM	TOTAL
APTT	0	0	0	0	0	0	0	1	0	0	0	0	0	1
AT&T	31	12	0	0	64	3	0	71	215	0	0	4	3	403
BT	0	0	0	0	3	0	0	0	21	1	0	0	1	32
BTE	0	0	0	0	1	0	0	1	1	0	0	0	0	3
CPRM	0	0	0	0	0	0	0	0	1	0	0	0	0	1
DBP	3	0	0	1	18	0	0	7	19	0	0	0	0	50
ENTEL	0	0	0	0	0	0	0	0	2	0	0	0	0	2
FT	0	0	0	1	3	0	0	3	16	1	0	0	0	24
IDB	0	0	0	1	1	0	0	0	5	0	0	0	0	7
ITALCABLE	1	0	0	1	2	0	0	2	6	1	0	0	0	13
LPT	0	0	0	0	0	0	0	0	1	0	0	0	0	1
MCB	0	0	0	2	18	1	5	18	84	18	0	7	2	156
MCL	1	0	0	1	10	0	0	4	22	2	0	0	0	40
NPTT	0	0	0	1	1	0	0	1	2	0	0	0	0	5
NT	0	0	0	0	1	0	0	0	0	0	0	0	0	1
RTT	0	0	0	0	2	0	0	1	5	1	0	0	0	9
SFPT	0	0	0	0	0	0	0	0	1	0	0	0	0	1
SPTT	0	0	0	0	3	0	0	1	5	0	0	0	0	9
STA	0	0	0	0	0	0	0	0	1	0	0	0	0	1
TD	0	0	0	0	0	0	0	1	1	0	0	0	0	2
TELEGLOBE	0	1	0	0	0	0	0	0	0	0	0	0	0	1
TELINTAR	0	0	0	0	0	0	0	0	1	0	0	0	0	1
TELMEX	0	0	0	0	0	0	0	0	4	0	0	0	0	4
TRT/FTC	0	0	0	0	2	0	0	2	4	1	0	1	0	10
US SPRINT	0	0	0	0	12	1	3	16	42	0	2	0	0	86
TOTAL	40	64	1	10	130	6	10	160	460	36	2	17	6	892

WHOLLY ASSIGNED MIUS

PARTIES	
AT&T	4
BTE	2
ITJ	36
KDD	18
TOTAL	60

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	HALF MIU INTERESTS
APTT	1	0	1
AT&T	403	4	411
BT	32	0	32
BTE	3	2	7
CPRM	1	0	1
DACOM	40	0	40
DBP	50	0	50
DGT	24	0	24
ENTEL	2	0	2
ETPI	1	0	1
FT	24	0	24
HKTI	10	0	10
IDB	7	0	7
IDC	130	0	130
INDOSAT	6	0	6
ITALCABLE	13	0	13
ITDC	10	0	10
ITJ	130	36	298
KDD	460	18	496
KT	36	0	36
LPT	1	0	1
MCB	156	0	156
MCL	40	0	40
NPTT	5	0	5
NT	1	0	1
PLDT	2	0	2
RTT	9	0	9
SFPT	1	0	1
SPTT	9	0	9
STA	1	0	1
TAB	17	0	17
TD	2	0	2
TELEGLOBE	1	0	1
TELINTAR	1	0	1
TELMEX	4	0	4
TM	6	0	6
TRT/FTC	14	0	14
US SPRINT	86	0	86
TOTAL	1784	60	1904

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SCHEDULE G5
U.S. MAINLAND – GUAM

PATH ASSIGNMENT OF MIUS IN THE TPC5 NETWORK

JOINTLY ASSIGNED MIUS

PARTIES	HKTI	IT&E	ITDC	KT	OTC	PHILCOM	PLDT	TAS	TM	TOTAL
AT&T	20	2	32	76	3	0	70	5	4	212
BT	0	0	1	0	0	0	0	0	0	1
BTE	0	0	0	0	1	0	0	0	0	1
DBP	0	0	1	0	2	0	3	0	0	6
FT	0	0	1	0	1	0	0	0	0	2
ITALCABLE	1	0	1	0	0	0	1	0	0	3
MCII	6	0	5	0	0	2	10	2	1	26
MCL	5	0	1	0	0	0	1	0	0	7
RTT	0	0	1	0	0	0	1	0	0	2
US SPRINT	5	0	3	0	5	1	5	0	1	20
TOTAL	37	2	46	76	12	3	91	7	6	280

WHOLLY ASSIGNED MIUS

PARTIES	
MCII	15
SPTT	1
US SPRINT	8
TOTAL	24

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	HALF MIU INTERESTS
AT&T	212	0	212
BT	1	0	1
BTE	1	0	1
DBP	6	0	6
FT	2	0	2
HKTI	37	0	37
IT&E	2	0	2
ITALCABLE	3	0	3
ITDC	46	0	46
KT	76	0	76
MCII	26	15	56
MCL	7	0	7
OTC	12	0	12
PHILCOM	3	0	3
PLDT	91	0	91
RTT	2	0	2
SPTT	0	1	2
TAS	7	0	7
TM	6	0	6
US SPRINT	20	8	36
TOTAL	560	24	608

29-Jan-92

SCHEDULE G6
HAWAII – JAPAN

PATH ASSIGNMENT OF MIUS IN THE TPC5 NETWORK

JOINTLY ASSIGNED MIUS

PARTIES	DGT	IDC	ITJ	KDD	TM	TOTAL
AT&T	0	0	1	5	0	6
HTC	1	3	6	8	0	18
MCII	0	0	0	5	0	5
OTC	0	0	0	0	1	1
TNZI	0	0	1	0	0	1
TOTAL	1	3	8	18	1	31

WHOLLY ASSIGNED MIUS

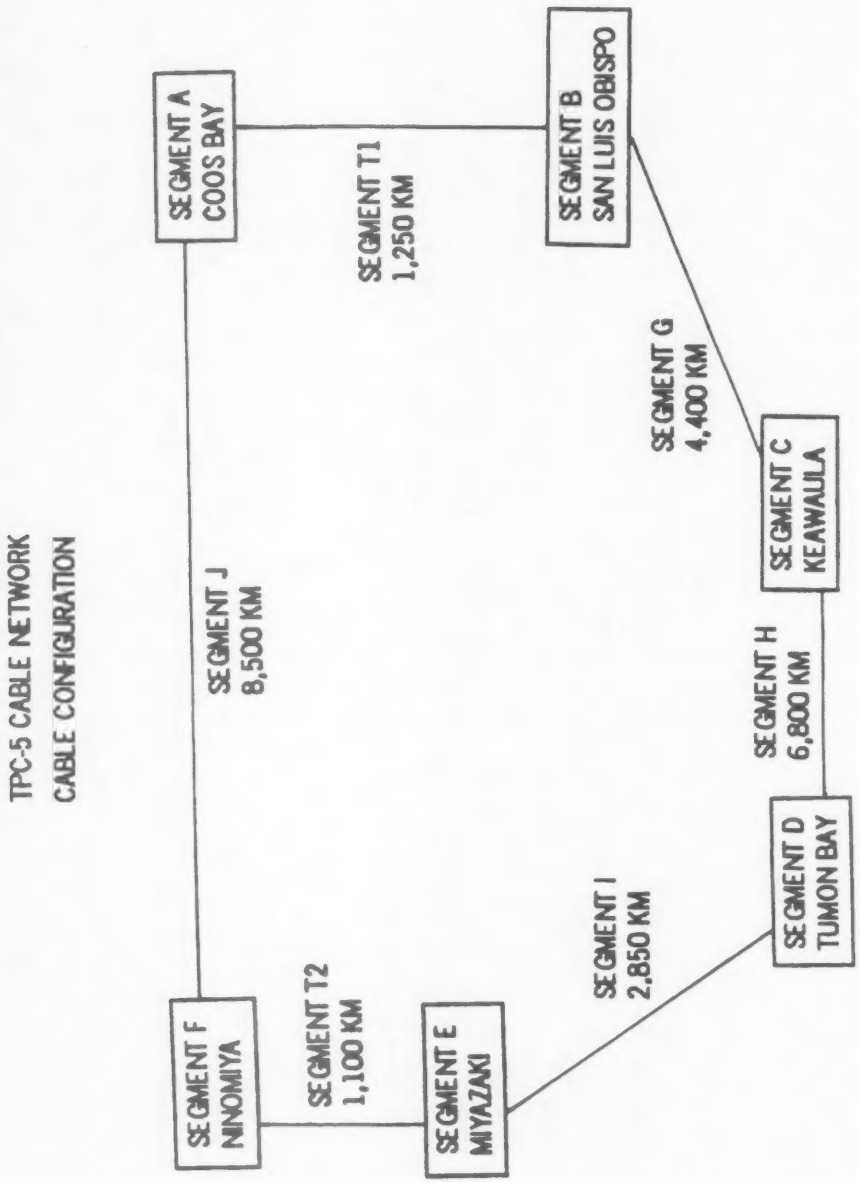
PARTIES	
ITJ	1
TOTAL	1

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	HALF MIU INTERESTS
AT&T	6	0	6
DGT	1	0	1
HTC	18	0	18
IDC	3	0	3
ITJ	8	1	10
KDD	18	0	18
MCII	5	0	5
OTC	1	0	1
TM	1	0	1
TNZI	1	0	1
TOTAL	62	1	64

29-Jan-92

ATTACHMENT A



FCC 92-466

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	
Rules with regard to the	)	GEN Docket No. 90-357
Establishment and Regulation of	)	
New Digital Audio Radio Services	)	

Notice of Proposed Rule Making and Further Notice of Inquiry

Adopted: October 8, 1992; Released: November 6, 1992

Comment Date: January 29, 1993
Reply Comment Date: March 1, 1993

By the Commission: Commissioner Duggan issuing a statement.

1. By this action, the Commission proposes to allocate spectrum domestically for satellite digital audio radio services (DARS)[1] based on the international allocation adopted for the United States by the 1992 World Administrative Radio Conference (WARC-92). In implementing the WARC-92 DARS allocation we seek to improve the ability of U.S. industry to compete in international markets and to provide the American public with additional audio listening choices of high quality and wide geographic coverage. In addition, in light of developments since the Commission adopted the Notice of Inquiry in this proceeding, we solicit comment on satellite and terrestrial DARS to update our record and assist us in developing specific technical and regulatory proposals.

BACKGROUND

[1] "DARS" is an all inclusive term that encompasses both terrestrial digital audio broadcasting (DAB) and digital audio provided by satellite. When necessary to distinguish between satellite and terrestrial services, we will use the appropriate adjective before "DARS."

2. In 1990, three parties requested the Commission to allocate spectrum or otherwise authorize the provision of digital audio radio services. On May 18, 1990, Satellite CD Radio, Inc., filed a petition for rule making in which it requested spectrum to offer a CD-quality digital audio radio service to be delivered by satellites and complementary terrestrial transmitters.[2] On May 22, 1990, Radio Satellite Corporation requested authorization to build and operate an earth station that would provide DARS and other mobile satellite services over the mobile satellite system licensed to be built by the American Mobile Satellite Corporation. Finally, on July 27, 1990, Strother Communications, Inc. filed a petition for rule making requesting that the Commission allocate spectrum and adopt rules for terrestrial digital audio broadcasting services.

3. The instant proceeding was initiated on August 1, 1990 by a Notice of Inquiry (NOI) soliciting information necessary for identifying spectrum and developing technical rules and regulatory policies for DARS in the United States.[3] In the NOI we noted international interest in the development of digital sound broadcasting. We expressed concern that the United States would be disadvantaged if it did not participate in this new technology.

4. In a parallel effort, by a series of inquiries between 1989 and 1991, the Commission solicited comment on appropriate U.S. positions to the World Administrative Radio Conference to be held in Spain in 1992.[4] Comment was sought, inter alia, on possible spectrum to be used for broadcast satellite delivery of high quality audio services (BSS sound). Based on the inquiries, and in coordination with the National Telecommunications and Information Administration (NTIA), the Commission supported a U.S. position seeking an allocation for satellite and complementary terrestrial DARS at 2310-2360 MHz.[5]

5. At WARC-92 three different BSS (sound) allocations were adopted. The United States obtained 2310-2360 MHz for its domestic use in Region 2. This allocation, like the allocations

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[2] See Satellite CD Radio, Inc.'s Petition for Rule Making (RM-7400) (May 18, 1990). That petition, comments filed in response thereto, and the other requests referenced in this paragraph all were incorporated in GEN Docket No. 90-357.

[3] Notice of Inquiry, GEN Docket No. 90-357, 5 FCC Rcd 5237 (1990).

[4] See Notice of Inquiry, GEN Docket No. 89-554, 4 FCC Rcd 8546 (1989); Second Notice of Inquiry, GEN Docket No. 89-554, 5 FCC Rcd 6046 (1990); Supplemental Notice of Inquiry, GEN Docket No. 89-554, 6 FCC Rcd 1914 (1991).

[5] See Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1991).

adopted for other areas of the world, was limited to audio broadcasting by digital modulation and, pursuant to Resolution COM 4/W, only the upper 25 MHz may be implemented prior to an international conference that is proposed to be convened no later than 1998 to plan the broadcasting-satellite (sound) service in the various bands allocated at WARC-92.[6]

DISCUSSION

6. During the last decade, commercialization of digital technology has brought the American consumer many choices for higher quality audio service. For example, we have witnessed the introduction of the compact disc (CD), digital audio tape, and the digital compact cassette. In the case of the CD in particular, we have seen rapid consumer acceptance and market penetration lead to the near demise of analog records. In addition, digital audio subscription services are now available for direct delivery to the home by cable. Also, digital modulation is increasingly common in radio telecommunications including, for example, cellular telephones. It is apparent that digital audio media are developing rapidly and that the increased quality they offer is gaining acceptance by consumers. It also is clear that a digital audio radio service is technically feasible.

Notice of Proposed Rule Making

7. Spectrum Allocation. The spectrum allocated at WARC-92 appears to be sufficient to foster the development of a domestic satellite digital audio radio service.[7] Moreover, it is apparent that satellite transmission at 2.3 GHz is practical and presents few technical barriers.[8] Satellite delivery of DARS could extend radio programming in new and novel ways. Consequently we propose the allocation adopted at WARC-92 for U.S. domestic DARS: 2310-2360 MHz on a primary basis for BSS

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[6] See International Telecommunication Union, Addendum and Corrigendum to the Final Acts of the World Administrative Radio Conference, at 20, footnote 750B (Malaga-Torremolinos, 1992).

[7] See Satellite CD Radio Compendium of Applications, December 30, 1991, at pages 67-70. Under Satellite CD Radio's plan, up to four separate systems of two satellites each could operate simultaneously in the 2310-2360 MHz band.

[8] See Direct Broadcast Satellite-Radio, Systems Tradeoffs Study, Final Report, Nasser Golshan, Jet Propulsion Laboratory, California Institute of Technology (March 1992).

(sound) and complementary terrestrial DARS.[9]

8. We note that the spectrum we are proposing for allocation to DARS is part of the 2310-2390 MHz band, currently allocated to non-Government mobile and Government mobile and radiolocation services on a shared, co-primary basis and used primarily for aeronautical telemetry purposes. There are ten non-Government licensees operating on frequencies between 2310-2360 MHz. It is likely that it would be difficult for these licensees to continue to operate on a primary basis on these frequencies if satellite DARS systems are introduced in the band.

9. Therefore, we propose to reaccommodate in the upper portion of the band between 2360-2390 MHz those stations now operating between 2310-2360 MHz. Stations electing to move to these frequencies would retain their primary status. Because equipment now used by licensees in the 2310-2360 MHz band is designed to operate between 2310-2390 MHz, we anticipate that there will be little conversion cost to the 2310-2360 MHz band incumbents. Because the spectrum is shared with the Government, the Commission's staff will coordinate non-Government use of the 2310-2360 MHz band for DARS with NTIA. We propose that upon adoption of final rules in this proceeding, existing services be permitted in the 2310-2360 MHz band on a secondary basis only. We request comment on this plan.

10. Coordination. At WARC-92, Canada and Mexico sought and received a BSS (sound) allocation at 1452-1492 MHz. The United States will coordinate use of the 2310-2360 MHz band with Canada, Mexico, and the Caribbean countries. Similarly, these countries will coordinate use of their DARS spectrum with the United States. Accordingly, it will be necessary for the United States and these countries to coordinate implementation of their respective WARC allocations before initiation of service.

Further Notice of Inquiry

11. Terrestrial DARS. In proposing to allocate spectrum for a satellite digital audio radio service, we are mindful that many terrestrial broadcasters support, and are pursuing, implementation of DARS within the existing radio broadcast

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[9] For the purpose of this proposed allocation, we deem complementary DARS to be an adjunct to a satellite based system, rather than a separate, stand-alone terrestrial service.

spectrum (terrestrial in-band).[10] Some broadcast interests indicate that an alternative terrestrial-only DARS in bands above 1 GHz would be impractical.[11] Most argue that any DARS implementation should be for improvement of existing radio broadcast service, rather than for an additional terrestrial or satellite service.[12]

12. We continue to support efforts to implement terrestrial in-band DARS technology. We believe that existing radio broadcasters can and should have an opportunity to take advantage of new digital radio technologies, and we are optimistic that technical advances will, in the near future, permit both FM and AM broadcasters to offer improved digital sound.[13] To this end, we are committed to continuing our work with the broadcast industry to ensure that broadcasters are able to promptly implement terrestrial DARS. We also believe, however, that the public will benefit from the development of various forms and distribution means of digital audio radio services. The allocation we are proposing today is the first step toward that end. We recognize that it will take a number of years before a satellite DARS system will begin providing service to listeners, and in the meantime we intend in this docket to explore other possible DARS services as they develop.

13. In the Notice of Inquiry in this proceeding, the Commission requested comment on broad issues concerning the future role of existing terrestrial broadcasters in providing digital audio services. At that time there was a wide range of spectrum options. In addition, the potential DARS technology was in the very early stages of planning. During the intervening two years much information has been developed, particularly of a technical nature, that may bear upon how terrestrial DARS should

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[10] We note that the Electronic Industries Association has formed a Digital Audio Radio Subcommittee to evaluate the technical characteristics of all potential DARS transmission systems, including terrestrial, satellite, and in-band technologies. Membership on the Subcommittee includes broadcasters, manufacturers, government agencies and research organizations. Meetings are open to the public and decisions are reached through agreed-upon procedures that reflect a commitment to fair representation of all industry segments. We believe that an industry forum that addresses technical issues related to DARS, with its particular sensitivity to changing technologies and marketplace conditions, is useful to a full and fair exposition of the issues involved and to reaching consensus where possible.

[11] See, e.g., Greater Media, Inc. Comments at 7.

[12] See, e.g., Mount Wilson FM Broadcasters, Inc., Comments at 2-4.

[13] In this regard, we note that one entity, USA Digital, recently announced that it has developed a digital audio radio system for use within the AM band. See Radio World, Vol. 16, August 19, 1992, at 8.

be introduced in this country. However, that information is not part of the Commission's record in this proceeding. Consequently, we solicit comment that will update the record on recent DARS developments, specifically with regard to the possible conversion of analog AM and FM broadcasting to digital broadcasting within the existing bands. We request comment particularly on the latest technical developments in DARS transmission systems and on possible accommodation of both AM and FM broadcasters in a new system of digital broadcasting. In this context, it is of particular importance that commenters address the feasibility of the various technical proposals, such as in-band FM digital systems operating both on and off channel, and the extent to which all existing broadcasters could be accommodated in a new system.[14] We also invite comment on the feasibility of in-band AM digital systems and the improvement over their existing service that may be realized. Finally, commenters are invited to address the general policy and regulatory issues the Commission should consider as it evaluates the feasibility of an in-band solution.

14. Other Matters. Commenters also are invited to address other matters pertinent to both satellite and terrestrial DARS. The purpose of the NPRM is to implement the WARC-92 DARS allocation and to indicate our general support for satellite and terrestrial DARS service in the United States. Specific proposals regarding other matters -- regulatory policies, service rules, technical standards and consideration of pioneer's preference requests[15] -- will be the subject of future action. We further note that in a related action, the Common Carrier Bureau has opened a filing window for applications to provide satellite DARS.[16] Based on the comments in response to this Further Notice of Inquiry, we will be in a better position to gauge the intentions of those proposing to offer domestic DARS, to consider the technical requirements of satellite and terrestrial DARS proposals, and to determine the most

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[14] The Commission believes it cannot determine who might be accommodated in terrestrial DARS, given the limited spectrum options (in-band service and the 2310-2360 MHz band for satellite services). Therefore, we request comment on whether some nationwide and regional satellite channels should be reserved for accommodating some number of AM and FM broadcasters.

[15] With regard to pioneer's preferences, we find there is good cause to delay the tentative award of a pioneer's preference until later in this proceeding. We note that DARS technology is rapidly evolving, but is not yet fully developed. Indeed, most of the technology proponents regard the details of their technical proposals as proprietary. However, work in this area is progressing, and as the technology becomes more fully developed and service proposals become specific, we will be able better to address pioneer's preference requests.

[16] See Public Notice, Report No. DS-1244, released October 13, 1992.

advantageous regulatory policies for new DARS services.

CONCLUSION

15. We believe satellite DARS will provide the public with a significant improvement in radio service. Satellite DARS will offer high quality, digital audio, custom listening services, increased coverage, and greater immunity to interference in mobile environments. We anticipate that rural areas will benefit from a wider choice of radio options. This NPRM is the first step in initiating this new service. At the same time, we are mindful of the need to make digital audio broadcasting opportunities available to existing broadcasters and to promote the development of new terrestrial DARS technologies. Accordingly, we also seek to update the record in this proceeding to learn more about the state of the art of terrestrial DARS.

INITIAL REGULATORY FLEXIBILITY ANALYSIS
Notice of Proposed Rule Making

16. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason for Action

This action is being taken to implement the digital Broadcast Satellite (sound) Service and complementary terrestrial service allocation that the United States obtained at WARC-92.

B. Objective

The objective of this proposal is to provide a spectrum allocation for the introduction of satellite and terrestrial digital audio radio services (DARS). DARS should benefit the public by providing higher quality, more interference resistance digital audio and ancillary services to American consumers.

C. Legal Basis

The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(f), 303(f), and 303(r). These provisions authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio in the public interest.

D. Description, Potential Impact, and Number of Small Entities Affected

This proposal may provide new opportunities for radio

equipment manufacturers and suppliers of radio equipment, some of which may be small businesses, to develop and sell new equipment. Because this proposal concerns allocation of spectrum for new services, we are unable to quantify other potential effects on small entities. We invite comment on this matter by interested parties.

E. Reporting, Record Keeping and other Compliance Requirements.

None.

F. Federal Rules which Overlap, Duplicate or Conflict with this Rule

None.

G. Significant Alternatives

This proposal will provide spectrum for new satellite and complementary terrestrial digital audio radio services. We are unaware of any alternatives that would provide the spectrum necessary to implement these services as contemplated. We solicit comment on this point.

PROCEDURAL INFORMATION

17. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and

18. The rule making proposals in this Notice constitute a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).303(r).

19. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 29, 1993, and reply comments on or before March 1, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed.

Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

20. For further information, contact Mr. Damon C. Ladson at (202) 653-8106, Office of Engineering and Technology, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

Proposed Rule Changes

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended by adding in the 2300-2450 MHz band in column (2) footnote designators 750B and 751X, by adding in the 2310-2360 MHz band in column 5 "BROADCASTING-SATELLITE", by removing in the 2310-2360 MHz band in column 5 "MOBILE", by adding in the 2310-2360 MHz band in column 5 "Mobile", by adding in the 2310-2360 MHz band in columns (4) and (5) footnote designators 750B, 751X, US327 and US328, and by adding the text of footnotes 750B, 751X, US327 and US328 at the end of the table as follows:

a. § 2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)

* * * * *

2300-2450 FIXED. MOBILE. Amateur. Radiolocation.	2300-2450 FIXED. MOBILE. RADIOLOCATION. Amateur.		2300-2310 RADIOLOCATION Fixed. Mobile. US253 G2	2300-2310 Amateur.	Amateur (97) US253	
			2310-2360 Mobile. Radiolocation Fixed. US276 US327 US328 G2 751X	2310-2360 BROADCASTING- SATELLITE Mobile. US276 US327 US328 751X		Digital Audio Radio Services
			2360-2390 MOBILE. RADIOLOCATION Fixed. US276 G2	2360-2390 MOBILE. US276		
664 751A 752	664 750B 751 751X 752		2390-2450 RADIOLOCATION 664 752 G2	2390-2450 Amateur. 664 752	Amateur (97)	

* * * * *

INTERNATIONAL FOOTNOTES

* * * * *

743A delete footnote

750B Additional allocation: in the United States of America and India, the band 2310-2360 MHz is also allocated to the broadcasting-satellite service (sound) and complementary terrestrial broadcasting service on a primary basis. Such use is limited to digital audio broadcasting and is subject to the provisions of Resolution COM4/W.

751A In France, the use of the band 2310-2360 MHz by the aeronautical mobile service for telemetry has priority over other uses by the mobile service.

751X Space stations of the broadcasting-satellite service in the band 2310-2360 MHz operating in accordance with No. 750B that may affect services to which this band is allocated in other countries shall be coordinated and notified in accordance with Resolution 33. Complementary terrestrial broadcasting stations shall be subject to bilateral coordination with neighboring countries prior to their bringing into use.

* * * * *

UNITED STATES (US) FOOTNOTES

* * * * *

US327 The band 2310-2360 MHz is allocated to the broadcasting-satellite service (sound) and complementary terrestrial broadcasting service on a primary basis. Such use is limited to digital audio broadcasting and is subject to the provisions of Resolution COM4/W.

US328 In the band 2310-2360 MHz, the mobile and radiolocation services are allocated on a primary basis until 1 January 1997 or until a broadcasting-satellite (sound) service and complementary terrestrial broadcasting service has been brought into use in such a manner as to affect or be affected by the mobile and radiolocation services in those service areas, whichever is later. The broadcasting-satellite (sound) service and complementary terrestrial broadcasting service during implementation should also take cognizance of the expendable and reusable launch vehicle frequencies 2312.5, 2332.5, and 2352.5 MHz, to minimize the impact on this mobile service use to the extent possible.

* * * * *

APPENDIX B
Comments and Reply Comments
(RM 7400 and GEN Docket No. 90-357)

RM-7400 Comments:

Aerospace and Flight Test Radio Coordinating Council
American Mobile Satellite Corporation
Association for Broadcast Engineering Standards, Inc.
Communications Satellite Corporation
Dolby Laboratories, Inc.
Electronics Industry Association/Consumer Electronics Group
Ford Aerospace
General Instrument Corporation
Hellenic Broadcasting Network
Hubbard Broadcasting
Intermart Broadcasting of Orlando
Kilminister, Neal T.
National Association of Broadcasters
Public Service Satellite Consortium
Radio Satellite Corporation
Recording Industry Association of America
Shamrock Broadcasting, et al.
Stanford Telecom
Strother Communications, Inc.
TAK Communications
Techsonic Industries
V.T.(OEM) Corporation
WCCO-AM
WHUR(FM)

RM-7400 Reply Comments:

Aerospace and Flight Test Radio Coordinating Council
Afrispace, Inc.
American Mobile Satellite Corporation
Boeing Support Services
Cable Radio Network
Communications Satellite Corporation
Dolby Laboratories, Inc.
Electronic Industries Association/Consumer Electronics Group
IDB Communications Group
Satellite CD Radio, Inc.

GEN Docket No. 90-357 Comments:

777 Broadcasting, Inc.
ABS Greenville Partners, Et Al.
Aerospace and Flight Test Radio Coordinating Council
Air Transport Association of American
American Boat and Yacht Council, Inc.

American Mobile Satellite Corporation
American Radio Relay League, Incorporated, The
American Stage Festival
April Broadcasting, Inc.
Associated Students UCLA
Association for Broadcast Engineering Standards, Inc.
Association for Maximum Service Television, Inc., The
Association of Independent Television Stations, Inc.
Barnstable Broadcasting, Inc.
Bellevue-Eastside Toastmasters
Berger Brothers Camera and Video Exchange
Bonneville International Corporation
Buckley Broadcasting Corporation
Canterbury Choral Society, The
Capstar Communications
Captal Cities/ABC, Inc.
CBS Inc.
Charles River Broadcasting Company
Cherokee National Historical Society
City of Montrose, Colorado
Communications Satellite Corporation
Connecticut Grand Opera
Continental Satellite Corporation
Corporation for Public Broadcasting
Cox Enterprises, Inc.
Crawford Broadcasting Company
Cromwell Group, Inc., The
Eastman School of Music-University of Rochester
Electronics Industries Association/Consumer Electronics Group
Elyria-Lorain Broadcasting Company
Emil Torick for Eureka 147 Digital Audio Broadcasting
European Broadcasting Union
Eustis, Jeffrey
Fairbanks Communications, Inc.
Fisher Broadcasting, Inc.
Gannett Co., Inc.
Gaulin, Gary S.
General Instrument Corporation
General Motors Research Corporation
Geostar Messaging Corporation
Golden West Broadcasters, Et Al.
Greater Media, Inc.
Home Recording Rights Coalition
Intercollegiate Broadcasting System, Inc.
Jed Broadcasting Co.
Jet Broadcasting Co., Inc., The
John Furr & Associates
KCUS(FM) Colorado State University
KKOR/KYVA, Inc.
Knab, Tom
KSUT(AM-FM)
Lambda Communications

Langston University
Legacy Broadcasting, Inc.
Leonard, John E., Jr.
Lincom Corporation
Maine Farm Bureau Association
Malrite Communications, Inc.
Marsh Broadcasting Corporation
Mercury Digital Communications
Metroplex Communications, Inc.
Mid-West Family Group
Minnesota Public Radio
Minnesota Trucking Association
Motorola, Inc.
Mount Wilson FM Broadcasters
Multi-Technology Analysis and Research Corporation
National Association of College Broadcasters, The
National Association of Broadcasters
National Association for the Advancement of Colored People, The
National Association of Broadcasters
National Campground Owners Association
National Federation of Community Broadcasters
National Public Radio
Norseman Broadcasting
North American Philips Corporation
Northrop Corporation, Et Al.
Osborn Communications Corporation
Pacific Communications Sciences, Inc.
Paul Mellon Arts Center
Peabody Institute of the Johns Hopkins University, The
Pennsylvania Farmer's Association
Philadelphia Orchestra, The
Public Service Satellite Consortium
Pulitzer Broadcasting Company
R-B Company, Inc.
Radio New Jersey
Radio Operators Caucus
Radio Satellite Corporation
Rainbow Village
Recording Industry Association of America
Ricks College
Right-Roc Group, The
Robinson, Richard; D.D.S.
Rocky Mountain Corporation for Public Broadcasting
Rocky Mountain Public Radio
Rudolph, Betty J.
Saga Communications
Satellite CD Radio, Inc.
Schober, Edward A.
Sconnix Broadcasting Company
Seattle Opera
Shamrock Broadcasting, Inc., Et Al.
Space Systems/Loral

Spaulding, Frederick L.; P.E.
Strother Communications, Inc.
Suffa, William P.; P.E.
Techsonic Industries
Texas Association of Counties
Tribune Broadcasting Company
Tulsa Performing Arts Center Trust
United Broadcasting Company
Universal Broadcasting Corporation
Utilities Telecommunications Council
Vtech (OEM), Inc.
Washington Opera, The
Waterfront Communications Corporation
West Virginia Radio Corporation
Westinghouse Broadcasting Company
Westport Country Playhouse
Westwood One Stations Group, Inc.
Westwood One, Inc.
WHUR(FM)
Wisconsin Public Radio
WWWB(FM)
Wyoming Farm Bureau Federation

GEN Docket No. 90-357 Reply Comments:

AFL-CIO, Department of Professional Employees
American Mobile Satellite Corporation
Associated Students UCLA
Association for Maximum Service Television, The
BMI
Capital Cities/ABC, Inc.
CBS, Inc.
DAB-Eureka 147 Project Office, The
Dajani, Nahida F.
Eustis, Jeffrey
Home Recording Rights Coalition, The
Modern Times Media Productions, Et Al.
National Association for Black Owned Broadcasters, Inc.
National Association of Broadcasters
National Association for the Advancement of Colored People, Et Al.
National Broadcasting Company, Inc.
New Mexico Commission on Public Broadcasting
Radio Satellite Corporation
Recording Industry Association of America
Satellite CD Radio, Inc.
Scientific Atlanta
Stanford Telecom

Strother Communications, Inc.
Techsonic Industries
WMNR Fine Arts Radio
Xavier University

October 8, 1992

SEPARATE STATEMENT
OF COMMISSIONER ERVIN S. DUGGAN

In the Matter of the Commission's Rules With Regard to the Establishment and Regulation of New Digital Audio Radio Services (GEN Docket No. 90-357)

From the outset of our work on digital audio radio, I have sounded two themes. First, I have suggested that this potential new service may be so appealing and technologically superior that resistance would be foolish--- and, so, instead of resisting, the Commission should act wisely to promote its development. Second, I have advocated balancing our enthusiasm for digital audio radio against the need to afford incumbent broadcasters a fair chance to join the technological race. For me, this means exploring what I have called a "hybrid" approach to DAB: developing a complementary set of both satellite-based and terrestrial offerings. I believe that the Commission's actions today are true to both of those public interest goals.

In the rulemaking phase of this proceeding, we launch a process to create a spectrum location for domestic satellite-based services. This limited step implements decisions made earlier this year at the 1992 World Administrative Radio Conference, where the global gravitational pull toward digital audio radio was abundantly clear. The Commission faces a great deal of work before digital audio radio delivered by satellite becomes a reality. We must establish service rules and adopt technical standards. We also must begin processing the applications of companies that have waited patiently for these steps to occur. I hope that we can act expeditiously, since delay is the enemy of new services: One of the original applicants, Radio Satellite Corporation, has already been forced to drop out.

The remaining phase of today's actions, a Further Notice of Inquiry, seeks information on recent developments in digital radio broadcasting, particularly in terrestrial technology. This aspect of our action is important: Some of the assumptions we made about terrestrial services just 24 months ago may no longer be valid. In 1990, for example, we assumed that scant hope existed for an in-band, digital service for AM broadcasting. Recently, however, a company called USA Digital seized attention in the industry by demonstrating precisely such a service. In-band FM technology also appears to show promise.

In yet another development, the Electronics Industry Association in recent months has established a digital radio task force and begun evaluating 11 different systems for digital audio broadcasting. EIA's initiatives appear to be a boon to competition in digital audio radio technology. They also have generated sharp discussions within the broadcasting industry. We need to learn more about such developments; this inquiry will help.

As I have repeatedly said, I continue to feel that another issue deserves careful attention: the potential impact of digital audio radio on local broadcasting. I remain committed to shoring up radio's ability to provide the vital local service that we have long expected of it--- and, indeed, the local service that the Communications Act requires. In my view, localism remains a touchstone value of broadcasting.

Last June, at a radio conference in Switzerland, I endorsed a hybrid approach to DAB because it seemed to me to offer the best of both worlds: satellite-based services reaching millions of listeners simultaneously, complemented by terrestrial offerings that preserve the important benefits of localism, technically enhanced. Such an approach, in my judgment, could produce the ultimate in programming diversity for American consumers. It could also protect the public interest bedrock upon which our system of radio broadcasting is built. I hope we can keep these principles in balance as we continue to explore the possibilities of digital audio broadcasting.

FCC 92-467

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	GEN Docket No. 90-314
	)	
	)	RM-7140, RM-7175, RM-7618
Amendment of the Commission's	)	
Rules to Establish New Personal	)	PP-4 through PP-20, PP-26,
Communications Services	)	PP-27, PP-41 through PP-70,
	)	PP-72 through PP-78

TENTATIVE DECISION AND MEMORANDUM OPINION AND ORDER

Adopted: October 8, 1992; Released: November 6, 1992

Comment Date: January 29, 1993
Reply Comment Date: March 1, 1993

By the Commission: Commissioner Barrett issuing a statement; Commissioner Duggan concurring and issuing a statement.

I. INTRODUCTION

1. This proceeding has sparked unprecedented interest in and exploration of new technologies and services by a wide variety of parties. A considerable number of parties have conducted substantial experimentation and assisted us in our deliberations to establish new personal communications services (PCS). In this Tentative Decision we consider the 56 requests for pioneer's preference accepted in this docket,[1] and tentatively conclude that three applicants merit preferences -- American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint).[2] We also consider twelve

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[1] SCS Mobilecom, Inc., PP-71, withdrew its pioneer's preference request by letter dated August 21, 1992.

[2] Section 1.402 of our Rules specifies that pioneer's preference decisions are to be made when a Notice of Proposed Rule Making is issued in a proceeding. In the Notice of Proposed Rule Making (Notice) issued in this docket, however, we found

petitions that request reconsideration or review of requests earlier dismissed, and affirm these dismissals for failure in their initial pleadings to provide required information.

II. BACKGROUND

2. The Commission's pioneer's preference rules provide preferential treatment in its licensing processes to parties that develop new communications services and technologies. This fosters the development of new services and improvements to existing services by reducing for innovators the delays and risks associated with the Commission's licensing procedure. True innovators of substantial new communications services and technologies have an opportunity to participate either in the new services that they took a lead in developing or in existing services with regard to which they took a lead in promoting application of new technologies.[3]

3. To be granted a pioneer's preference, an applicant must demonstrate to us its responsibility for one or more significant innovations that relate to communications technology or service, and significant effort in developing the innovation and pursuing authorization of its implementation. We do not grant pioneer's preference requests casually, but rather, require that each requester persuade us that its proposal is innovative, has merit, and that the requester is the original developer and proponent of the innovation at issue.[4]

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good cause for not doing so in this particular case because of the uncertainty and contingent nature of our 2 GHz proposals, which in part were to be decided in our Emerging Technologies proceeding, ET Docket No. 92-9. Accordingly, we decided to consider the pioneer's preference requests in this docket only after issuing a Report and Order in the Emerging Technologies proceeding, see Establishment of New Personal Communications Services, Notice, GEN Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 at 5733 (1992). On September 17, 1992, we adopted a Report and Order in the Emerging Technologies proceeding and therefore now turn to the pioneer's preference requests in GEN Docket No. 90-314, see New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, FCC 92-437 (released October 16, 1992).

[3] The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, 5.207. See Establishment of Procedures to Provide a Preference, Report and Order, 6 FCC Rcd 3488 (1991); recon. granted in part, Memorandum Opinion and Order, 7 FCC Rcd 1808 (1992); further recon. pending.

[4] See Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, Tentative Decision, 7 FCC Rcd 1625 at para. 13 (1992).

4. For each request before us, we have evaluated, inter alia, (1) whether the requester has demonstrated that its proposal constitutes a significant communications innovation; (2) whether it has made a significant contribution in developing that innovation; and (3) whether the innovation reasonably will lead to establishment of a service not currently provided or substantially enhance an existing service. In applying these criteria, we employ the pioneer's preference standards set out in our rules and applied in our previous tentative decisions that consider award of pioneer's preferences.[5] We consider whether a proposal is "to provide either a service not currently provided or a substantial enhancement to an existing service"[6] by evaluating factors that include, but are not limited to, (1) added functionality; (2) new use of spectrum; (3) changed operating or technical characteristics; (4) increased spectrum efficiency; (5) increased speed or quality of information transfer; (6) technical feasibility; and (7) reduced cost to the public. In addition, to be eligible for a tentative award, at the time of the tentative decision a requester must have obtained an experimental license, commenced its experiment, and reported at least preliminary findings to the Commission that tend to confirm the technical feasibility of its proposal; or alternatively, a requester must have submitted a written showing that demonstrates the technical feasibility of its proposal.[7]

5. Our rules also require that a preference be granted only if the rules that are adopted for application to the new technology or service are a reasonable outgrowth of the proposal and lend themselves to grant of a preference. At the tentative decision stage we consider our proposed rules to be the rules against which a preference request is measured. We note that in this docket a number of requesters proposed various technical rules, but that in the Notice we declined to limit future technological innovation by unduly structuring PCS services or by detailing technical standards beyond those necessary to prevent harmful interference.

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[5] See Low-Earth Orbit Satellites, id; Personal Communications Services, supra note 2 at paras. 140-163; and Allocate Bands for Use by Mobile-Satellite Service, Notice of Proposed Rule Making and Tentative Decision, ET Docket No. 92-28, 7 FCC Rcd 6414 at paras. 33-51 (1992).

[6] 6 FCC Rcd 3488 at para. 49.

[7] 7 FCC Rcd at 1809.

III. DISCUSSION

Requests Tentatively Granted

6. We have reviewed the 56 requests for pioneer's preference pending in this docket, and for the reasons stated below tentatively decide that APC, Cox, and Omnipoint each merit a tentative preference. The goal of this rule making is to provide for provision of PCS to the public in a timely fashion and in a manner that promotes diversity and market-driven services within the PCS family of services. We believe that this goal is furthered by granting preferences to these three entities that, each in their distinct spheres, have led the way in proposing specific PCS concepts and followed through on their proposals by demonstrating the technical feasibility of those concepts through testing and development of experimental systems. APC, PP-6, warrants a pioneer's preference for its development and demonstration of technologies that facilitate spectrum sharing by PCS and microwave users at 2 GHz. APC's Frequency Agile Sharing Technology (FAST) will permit implementation of some PCS services without initially requiring relocation of the current licensees operating in the 1850-1990 MHz band. Cox, PP-52, deserves a pioneer's preference for its development and demonstration of PCS/cable plant interface technology and equipment that results in a spectrum-efficient application for PCS services. Finally, Omnipoint, PP-58, merits a preference for its development of 2 GHz equipment that utilizes advanced techniques that will facilitate the continued development and implementation of PCS services and technologies.

7. American Personal Communications. In November 1989, APC requested a license under Part 5 of our Rules for PCS experimentation. In June 1991, APC filed a report in which it argued that the 900 MHz band contained insufficient spectrum to provide broad-based PCS to a large number of consumers. Instead of continuing to consider 900 MHz for implementation of PCS, APC suggested concentrating on the 1850-1990 MHz band. While it was not first to suggest these frequencies, it focused attention on sharing this band by submitting a comprehensive study that concluded that at least 50 MHz of non-contiguous spectrum is unused within this band in 96% of the geographic area of the eleven major urban locations studied. This finding influenced the Commission's later proposals for PCS to share the band with microwave operators. This finding also led to APC's concentration on proposals for relatively narrowband transmission techniques that could be used in a coordinated manner to fashion a unified system operating within the unused non-contiguous channels that exist within this band; and later to APC developing its FAST technology to permit efficient sharing of this spectrum with the existing users.

8. As described by APC, FAST is a method of frequency selection that has been designed by APC and for which the first phase of field testing was completed on April 24, 1992. The FAST system, being independent of both modulation and access technique, appears to be relatively flexible and compatible with time division multiple access (TDMA), code division multiple access (CDMA), or other techniques that now exist or may be developed. Operating under experimental authority, APC demonstrated the technical feasibility of its system through testing, including field tests that used 80 MHz channel separation (which is identical to the channel separation proposed in the Notice) and CDMA access techniques configured into 1.25 MHz frequency division duplexed channels.[8] Its FAST system uses theoretical interference analyses to protect existing microwave operations as well as field strength measurements to identify optimum PCS channels and verify the results of the theoretical analyses.[9] APC also has researched and addressed many of the necessary components needed to develop an efficient PCS operation, including the development of a site-specific propagation prediction tool that takes into account the site's terrain and specific building structures to determine optimum cell location.

9. We note that APC's claims are controverted. Corporate Technology Partners (CTP) alleges that APC's basic approach to FAST appears to have been developed much later, and in many ways derived from, an approach invented by CTP together with Bell Northern Research and further enhanced by additional research by

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[8] This technology was developed by Qualcomm Incorporated.

[9] APC also has made innovative proposals to govern relocation of existing 2 GHz fixed microwave users, should additional 2 GHz capacity to accommodate PCS growth be required. We expect that during the early years of PCS implementation the basic FAST approach will permit establishment of PCS services with sufficient capacity in most geographic areas to serve significant numbers of consumers. This will permit PCS to be initiated and the marketplace to determine whether PCS providers should negotiate with and reimburse fixed microwave users to acquire spectrum for additional capacity. This approach has significant benefits. If PCS is successful in the marketplace, PCS providers will have the resources and incentive to negotiate relocation terms. On the other hand, should PCS demand develop slower than expected, or not at all, the existing fixed microwave users could remain undisturbed within their existing spectrum. We adopted this approach in the Emerging Technologies proceeding, ET Docket No. 92-9. See New Telecommunications Technologies, supra note 2.

CTP.[10] CTP dates its dissemination of information about its "narrow channel frequency-sensing technology" to October 1990. In its reply comments, APC correctly dates its public dissemination of the FAST concept to its FCC application for an experimental authorization filed on May 3, 1990, and notes that this predates by several months the experimental application of Easyphone, Inc., CTP's apparent predecessor-in-interest, and alleged divulgence by CTP to APC of CTP's approach.

10. Regardless of APC being the first to describe a frequency agile approach designed specifically to work in the 2 GHz range, we agree with APC that CTP's system of adjusting transmitters upon installation to avoid the frequencies used by fixed microwave operations in the service area differs from APC's proposal and later developed FAST technology in that to avoid interference FAST technology can dynamically adjust the frequencies used. While we tentatively award this pioneer's preference to APC based upon the totality of the record of its contributions, we note that the FAST technology is one of the central concepts justifying this award and we find that APC's FAST system differs from that of CTP in substantial ways that eliminate any need to consider further the requesters' filing timetables or communications.

11. For these reasons, we tentatively conclude that APC should be awarded a pioneer's preference. If the tentative preference is confirmed and APC otherwise is qualified, APC would be the only eligible applicant for one of the frequency blocks for the area that includes its requested service area, the Washington, D.C./Baltimore, Maryland Metropolitan Statistical Area (MSA).[11]

12. Cox Enterprises. We tentatively conclude that Cox warrants a pioneer's preference for its spectrum-efficient proposal to use the cable television plant for connecting PCS microcells and its subsequent development and demonstration of equipment capable of interfacing PCS microcells with copper, fiber, and hybrid copper/fiber cable plant.

13. On September 20, 1990, in applying for an experimental license, Cox became the first party to propose use of the cable television plant for connecting PCS microcells. Successfully

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[10] See Comments of Corporate Technology Partners on APC's Request for Pioneer's Preference at 4.

[11] In the Notice, the Commission proposed four service area options. Both Washington and Baltimore are in the same service area in two of the four proposed options. If the service area scheme adopted separates Baltimore and Washington, we would permit APC to elect which service area it desires.

using the existing cable plant for such connections would permit economical and rapid deployment of PCS systems and substitution of existing infrastructure for increasingly scarce spectrum. In addition to proposing the cable distribution plant for PCS cell connections, Cox also was the first to propose moving expensive modulation electronics from each microcell to a centralized location and using small, passive antennas, called "distributed antennas," to alter cell shapes and cover what otherwise would be dead coverage areas.

14. On February 12, 1992, Cox demonstrated the technical feasibility of its concept by using cable plant to carry a PCS phone call over an operating cable system. To accomplish this communication, Cox used a "Cable Microcell Integrator" (CMI) that received voice channels, and modulated and multiplexed them to a single 1.544 megabit per second line. The signals can be sent in either direction over the cable plant -- to the headend or to a PCS microcell -- and are then downconverted back to voice channels. The CMI was designed under joint contract with Scientific Atlanta. In addition, the Cox microcell, suitable for placement in the outside pole-mounted cable plant, includes both a transmitter/receiver and antenna integrated with the CMI. This equipment is capable of use in fiber, copper, or hybrid fiber/copper cable distribution systems. In March of 1992, Cox successfully demonstrated cell-to-cell handoff with cable connected microcells and 2 GHz equipment. Cox also demonstrated centralized modulation during its March tests by receiving a 2 GHz CDMA signal, converting it to an intermediate frequency, and transmitting it across cable to a centralized location for demodulation.

15. We tentatively conclude that Cox deserves a pioneer's preference because of its pioneering proposal and successful development and field testing of the components necessary for implementation of the first working cable PCS system, including the CMI. Notably, the cable television signals being carried simultaneously on the cable were not degraded and the call itself appeared to be within the normal range for telephone quality.

16. We note that others, following Cox's application, proposed similar concepts. Cablevision Systems Corporation filed its experimental license application soon after Cox. While Cablevision's proposal is similar to Cox's, it has not developed and demonstrated its proposed PCS technology. For example, experimental reports indicate that at the time Cox made the nation's first PCS call over cable plant, Cablevision was doing propagation tests and investigating which modulation technique to use over cable. In March of 1992 Cox was completing 2 GHz PCS calls with cell to cell handoff on the cable plant, while Cablevision was testing the efficiency of transmitting digital signals on cable by demonstrating communication by computers

directly wired to the cable plant.[12] While Cablevision's August 31, 1992 experimental report indicates that it has successfully tested a remote antenna driver (RAD) at vehicular speeds using The Nexus Group (Nexus) 800 MHz equipment, its report does not indicate testing of 2 GHz equipment nor define its specific contribution, if any, to the technology or equipment provided by Nexus. RAD equipment appears to have been developed by Nexus, and we note that other cable PCS entities, including Satcom, Inc., Telecable Corporation, and Time Warner Telecommunications, Inc. (Time Warner), are testing the same equipment.[13]

17. Time Warner and Comcast also claim developments that appear to have been preceded by substantially similar developments disclosed by Cox, and do not distinguish the

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[12] In the large LEO proceeding we "tentatively concluded that Ellipsat has failed to meet its burden of demonstrating that its proposal is new and innovative, and therefore that its request should be denied" for a pioneer's preference. See Mobile-Satellite Service, supra note 5 at para. 39. In our discussion of Ellipsat's application, we also noted that there were no "significant timing differences in the application process to indicate that one or more of the applicants had a long lead over the others in activities such as concept design and verifiable, relevant experiments." Id. at para. 40. In this connection, we stated that "in this instance it would be inappropriate to single out any applicant or applicants based on the timing of formal submissions to the Commission." Id. The time interval between Ellipsat's filing and another applicant's filing was three weeks, whereas here Cox preceded the others by more than more than six months in demonstrating 2 GHz PCS over cable plant. More importantly, the time factor is significant in this proceeding because the applicants have received experimental licenses and a substantive comparison can be made as to when each applicant successfully demonstrated its technology. By contrast, in the large LEO proceeding, none of the applicants had been granted experimental licenses and none were found to have demonstrated the technical feasibility of their proposals. Id. at 50. Thus, a comparison could be made only of the time interval between the filing of their pioneer preference requests and related applications, a comparison significantly less important than the time interval between actual development and demonstration of a technology. Accordingly, we conclude that in this instance it is appropriate to consider the longer lead that Cox had in "concept design and verifiable, relevant experiments."

[13] See Cablevision's Fifth Quarterly Report at Part III-2 (May 31, 1992); Satcom's Quarterly Report at 2 (July 14, 1992); Telecable Corporation's Second Quarterly Report (May 19, 1992); and Time Warner's Fourth Quarterly Report at 1 (March 31, 1992).

pioneering aspects of their developments from those of Cox that already were in the record. On September 30, 1992, Time Warner reports completing a 2 GHz PCS call over coaxial cable, which we note is six months after Cox.[14] Time Warner also discusses its digital transport carrier equipment as meriting a preference, but this equipment appears to perform the same functions as Cox's CMI, that was earlier developed and demonstrated. Similar comparisons can be made between Cox and Comcast PCS Communications, Inc. (Comcast). For example, Comcast's September 3, 1992 report states that it used 900 MHz equipment to make end-to-end calls over cable plant, but this was preceded by five months by Cox's first call, Comcast does not distinguish its developments from earlier developments already in the record. Comcast also does not appear to have tested a 2 GHz system.[15]

18. We believe that the use of embedded plant to carry PCS signals, whether the plant belongs to cable television, inter-exchange carriers, private utilities, railroads, switched telephone networks, or others, is highly efficient and that such use would reduce future demands for significant amounts of microwave spectrum to connect individual PCS cells together and to networks. We further believe that cable's use will promote immediate and inexpensive PCS service to the public because embedded plant already exists in most areas. Use of cable PCS microcells, distributed antennas, and headend equipment, all of which Cox first proposed and initially demonstrated, may reduce the need for expensive towers and spectrum for backbone communications. Accordingly, if the tentative preference is confirmed, if otherwise qualified Cox would be the only eligible applicant for one of the frequency blocks for an area that includes its requested service area, the San Diego metropolitan area.[16]

19. Omnipoint Communications. We tentatively conclude that Omnipoint deserves a pioneer's preference for its equipment development. Omnipoint's pioneering work can be categorized into three areas: radio frequency engineering and related spread spectrum product design, development, miniaturization, and deployment of equipment; system architecture design that facilitates coexistence with other users of the same frequencies; and design and development of a base station interface that is compatible with advanced features of the public switched telephone network, including Integrated Services Digital Network,

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[14] See Cox's Fifth Quarterly Report at 2 (May 20, 1992).

[15] See Comcast's Fifth Quarterly Report at 5-7 (September 3, 1992).

[16] Two of the four service area options include Los Angeles.

Signaling System 7, and Advanced Intelligent Network features that are likely to be useful for PCS development.

20. We are persuaded that Omnipoint merits a tentative preference because it was the first to produce practical, working 2 GHz equipment for PCS. In the past five years Omnipoint has designed, prototyped, field tested, and produced innovative handheld equipment that operates in the 1850-2200 MHz band.[17] Omnipoint's experimental equipment uses direct sequence spread spectrum access techniques in a 10 MHz channel. We recognize that there likely will be a number of equipment designs for PCS, some of them significantly different from that of equipment developed by Omnipoint in terms of access technique, bandwidth, size, or level of development. The original work of Omnipoint, however, has contributed significantly to the early development and testing of PCS services and design concepts. Omnipoint's leadership in design and development is evidenced by its providing advanced handsets to entities such as American Portable Telecommunications, Inc., Ameritech, Cox, Time Warner, and other experimental licensees.

21. Other pioneer's preference applicants request a preference for innovations in equipment design, but these requests do not meet the standards of our rules. Several entities, including PCN America, Inc., have developed equipment that uses a wide bandwidth. The development of this equipment may be innovative, but since the bandwidths proposed do not correspond with those included in our proposed rules, these requests do not qualify for a preference. Qualcomm Incorporated has developed CDMA equipment that operates with a 1.25 MHz bandwidth at cellular frequencies, but neither applicant has filed an experimental report that addresses equipment test results at 2 GHz.[18] Use at cellular frequencies already is permitted. Merely proposing to convert existing cellular CDMA equipment to operate at 2 GHz fails to demonstrate the technical feasibility of designing and operating such equipment at these higher frequencies. Advanced MobileComm Technologies, Inc., Digital Spread Spectrum Technologies, Inc., and Associated PCN Corporation also propose new equipment concepts; however, experimental reports provide no evidence that these entities have produced and tested such equipment.

22. We expect that the concepts and technological developments pioneered by Omnipoint will facilitate the

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[17] See Omnipoint's Request for Pioneer's Preference at 6 (May 4, 1992).

[18] Qualcomm received an experimental license to operate in the 1850-1990 MHz band on February 21, 1992, but no progress reports have been filed.

implementation of PCS in the 2 GHz band and permit sharing with fixed microwave licensees. Omnipoint's design, development, manufacture, and demonstration of spectrum-efficient innovative concepts as set forth in its request for pioneer's preference and experimental file prove the feasibility of its concepts. Accordingly, if the tentative preference is confirmed and Omnipoint is otherwise qualified, Omnipoint would be the only eligible applicant for one of the frequency blocks for the area that includes its requested service area, the Northern New Jersey area.[19]

23. Conclusion. Consistent with our pioneer's preference rules, our decision to award these three preferences is preliminary in nature, and we will carefully review comments that focus on the requests of these three entities.[20] Comment should be made in pleadings that address only this Tentative Decision, and must cite the relevant pioneer's preference file numbers on the first page of the filing. Parties are reminded that this proceeding is restricted because all of the pioneer's preference requests have been opposed formally.

Requests Tentatively Denied

24. In order to ensure that pioneer's preference proposals are technically feasible, our rules require that each requester demonstrate the technical feasibility of its proposal. This demonstration is required to ensure that the proposal, if authorized, is capable of being implemented. The demonstration can be accomplished through a written submission or by reporting at least preliminary results of a relevant experiment. The following pioneer's preference requests are tentatively denied for failure to submit either the preliminary results from an experiment or a sufficient showing of technical feasibility.

PP-9: Atlantic Cellular Company, L.P.
PP-11: Dial Page, L.P.
PP-12: Linkatel Communications, Inc.
PP-18: Tel/Logic Inc.
PP-20: Vanguard Cellular Systems, Inc.
PP-26: Sharecom-Austin, L.P.
PP-48: Cable USA, Inc.

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[19] Three of the four service area proposals include New York City with Northern New Jersey.

[20] Our tentative decisions both granting and denying pioneer's preference requests are tentative, not final, and we will carefully review comments before reaching a final determination. These tentative decisions are not final for purposes of petitions for reconsideration, see 47 C.F.R. § 1.106.

PP-57: Iowa Network Services, Inc.
PP-64: Panhandle Telephone Cooperative, Inc.
PP-76: Telmarc Telecommunications Co.

25. The following pioneer's preference requesters submitted a technical showing or some sort of preliminary results from an experiment. However, the technical showing or preliminary result does not demonstrate the feasibility of the technology, or that the requester has developed the capabilities or possibilities of a specific identifiable PCS technology or service or has brought it to a more advanced or effective state. Accordingly, these requests are tentatively denied.

PP-7: American Portable Telecommunications, Inc.
PP-13: LiTel Telecommunications Corporation
PP-14: NAC, Inc.
PP-19: US West NewVector Group, Inc.
PP-47: Broadband Communications Corporation
PP-55: Freeman Engineering Associates
PP-56: Grand Broadcasting Corporation
PP-59: Omnipoint Corporation, Oracle Data Publishing, Inc. and McCaw Cellular Communications, Inc.
PP-60: Omnipoint Mobile Data Company
PP-63: PageMart, Inc.
PP-67: Pulson Communications Corporation
PP-73: Spatial Communications, Inc.

26. The following pioneer's preference requesters each submitted technical feasibility demonstrations or preliminary results from experiments that appear to demonstrate the technical feasibility of their proposal. However, upon review we have determined that these proposals constitute compilations or aggregations of existing communications technologies or systems or otherwise do not constitute unique or innovative technology or service proposals. Accordingly, these requests are tentatively denied.

PP-8: Associated PCN Corporation
PP-16: Personal Communications Network Services of New York, Inc.
PP-17: Southwestern Bell Personal Communications, Inc.
PP-45: Ameritech
PP-46: Bell Atlantic Personal Communications, Inc.
PP-49: Cellular Service, Inc.
PP-54: Fleet Call, Inc.
PP-61: Pacific Bell
PP-62: PacTel Corporation
PP-66: PerTel, Inc.
PP-72: SM Tek, Inc.
PP-77: TRX Transportation Telephone Co.
PP-78: Viacom International, Inc.

27. The following requesters propose a second generation cordless telephone (CT-2) system. While CT-2 type services are candidates for the 900 MHz spectrum proposed in the Notice for narrowband PCS, such systems do not meet our threshold test for innovativeness. Specifically, CT-2 technology was developed several years ago and already has been implemented in various parts of the world. Accordingly, we tentatively deny the following requests that are based on CT-2 technology.

PP-4: Advanced Cordless Technologies
PP-5: Advanced Wireless Communications, Inc.

28. The following requesters for pioneer's preference base their requests on the use of cable television facilities to provide PCS. However, we find that while these companies propose efficient use of cable facilities to provide PCS, as discussed above, Cox appears to have first proposed such integration, developed the necessary hardware, and conducted at least preliminary field trials with actual hardware. Therefore, these requests are tentatively denied.

PP-10: Cablevision Systems Corporation
PP-27: Time Warner Telecommunications, Inc.
PP-41: Adelphia Communications Corp.
PP-50: Comcast PCS Communications, Inc.
PP-70: Satcom, Inc.
PP-75: Tele-Communications, Inc.

29. Three of the requesters propose broadband CDMA systems that will not fit within the proposals made in our Notice. PCN America, Inc. (PCNA), PP-15, requests a preference for development of a broadband 2 GHz CDMA system. PCNA maintains that it has committed substantial effort and resources to the development of PCS as a technology and service concept. It argues that it has demonstrated the efficacy of broadband spread spectrum transmissions for frequency sharing with microwave operators through extensive testing using innovative prototype spread spectrum base and mobile stations. We agree with PCNA that it has extended substantial effort and resources in this project and done innovative work and design. However, our proposals in the Notice do not provide for wideband operations and would not accommodate the system design set forth by PCNA in its request. An essential facet of a tentative preference award is that the awardee's proposal is accommodated by our proposed rules. In the case of PCNA, our proposed channel bandwidths are incompatible with its broadband system.[21] Therefore we tentatively conclude that award of a pioneer's preference to PCNA is not justified. American TeleZone, PP-44, also proposes a

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[21] In its Second Quarterly Report filed on May 20, 1992, PCNA reduced its total system bandwidth to 40 contiguous MHz.

broadband CDMA system that would require a total system bandwidth of 80 MHz. We deny this request because of its incompatibility with our proposals set forth in the Notice. Finally, PCN Communications, Inc., PP-65, proposes a broadband CDMA system that would require 25 MHz for transmission and 25 MHz for reception. We deny its request because of its incompatibility with our proposals.

30. Advanced MobileComm Technologies, Inc. (AMT) and Digital Spread Spectrum Technologies, Inc. (DSST), PP-42, in a consolidated filing, each request a separate pioneer's preference for their technical approach. Together these requesters propose Synchronous-CDMA (SCDMA) technology that they have analyzed through computer simulation. AMT and DSST contend that the SCDMA narrowband approach would avoid interference to ? GHz fixed microwave users, as opposed to the wideband CDMA approaches that attempt to overcome, rather than avoid, interference. While many aspects of these proposals appear to be innovative, the experimental reports indicate that AMT has just begun initiating preliminary tests using British equipment, and that DSST has performed computer simulations and spectrum studies. Neither party appears to have developed 2 GHz PCS technology to the point of field testing.[22] In addition, the spectrum scheme proposed by the requesters is substantially different than that which we proposed in the Notice. Accordingly, we tentatively conclude that this request for pioneer's preference should be denied.

31. Corporate Technology Partners (CTP), PP-51, bases its preference request upon a 2 GHz interference-avoiding narrowband CDMA system (ISCDMA). As we discussed above with regard to our tentative award of a preference to APC, we believe that APC has brought to fruition a superior method of frequency avoidance. We find no merit to CTP's arguments that APC's technology is derived from that developed by CTP. Accordingly, we tentatively conclude that CTP does not merit a pioneer's preference.

32. Qualcomm Incorporated (Qualcomm), PP-68, requests a pioneer's preference based upon a narrowband CDMA system that it argues would facilitate sharing with existing users. On the record, it appears that the Qualcomm proposed system essentially is identical to that which it already has developed for use in the 800 MHz cellular bands. Since filing their pioneer's preference request in May, Qualcomm has not indicated to us that it has in fact developed and tested 2 GHz equipment. Accordingly, we tentatively conclude that Qualcomm does not merit a preference for just suggesting their equipment may be converted from 800 MHz technology to work at 2 GHz.

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[22] See AMT's Progress Report filed on August 17, 1992 and DSST's Progress Report filed on August 12, 1992.

33. American Telephone and Telegraph Company (AT&T), PP-43, proposes use of the 6 GHz band for PCS. We believe that research and developmental work that addresses using this band is commendable. However, inasmuch as the Notice addresses allocating only the 900 MHz and 2 GHz bands for provision of PCS to consumers, we tentatively deny this request for pioneer's preference because it is not related to the spectrum addressed in these dockets. However, if we later consider allocation of 6 GHz for PCS service, AT&T will have the opportunity to reapply for a preference.[23]

34. Radio Telecom and Technology, Inc. (RTT), PP-69, proposes to use frequencies currently used for UHF television broadcasting for its PCS concept. As in the case of AT&T, supra, inasmuch as the Notice addresses only the 900 MHz and 2 GHz bands for provision of PCS, we tentatively deny this request for pioneer's preference because it is not related to the spectrum addressed in these dockets.[24]

35. Suite 12 Group (Suite 12), PP-74, proposes to use 28 GHz frequencies for inter- and intra-building communications, PCS backbone communications, and point-to-multipoint communications based on a cellular concept. Inasmuch as the Notice addresses only the 900 MHz and 2 GHz bands for provision of PCS, we tentatively deny this request for pioneer's preference because it is not related to the spectrum under consideration in these dockets. We take this action without prejudice to Suite 12's essentially identical request, PP-22, that is associated with RM-7872.

36. Ericsson Business Communications, Inc., in PP-53, proposes voice and low speed data Business PCS services that would use a total of 8 MHz in the 940-948 MHz band. Inasmuch as

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[23] We note that SM Tek, Inc., PP-72, claims to be responsible for developments that would permit use of higher frequencies for PCS. SM Tek also will have the opportunity to reapply if we address allocating higher spectrum.

[24] We note that on June 6, 1991, RTT's request for waiver of 47 C.F.R. § 15.247 to permit operation of its T-NET system on vacant UHF television channels was denied because of the pendency of the advanced television proceeding, MM Docket No. 87-268, that addresses use of this spectrum. See Public Notice dated August 28, 1991, Mimeo No. 14559. RTT has filed a petition for review of this dismissal. We also note that in GEN Docket No. 91-2 the Commission adopted rules that permit operation of RTT's system on a licensed basis in the 218-219 MHz band, so long as it complies with Part 95 interactive video and data service requirements, see 7 FCC Rcd 1630 (1992), recon. granted in part, 7 FCC Rcd 4923 (1992).

the rules we propose in the Notice address only the 901-902, 930-931, and 940-941 MHz bands and propose to assign no more than a total of 500 kHz to a licensee, we tentatively deny this request for pioneer's preference because it is not consistent with the proposals made in the Notice.

Requests Previously Dismissed on Delegated Authority

37. In this proceeding we received 96 pioneer's preference requests. Fifty-seven were accepted and 39 were dismissed. Comment was received on the 57 accepted. The 39 dismissed requests were filed after the Commission's April 3, 1992, announcement of its filing deadline for requests in this docket[25] and failed to provide the Commission with the information required by its rules. In twelve petitions subsequently filed, 21 of the dismissed requesters seek either reconsideration or review of their dismissal.[26] We treat all of the petitions as applications for review, and for the reasons set forth below we affirm the dismissal in each case.

38. Previously we expressed our awareness of the potential that the availability of a pioneer's preference award could encourage hastily developed proposals and attract speculators. To deter such filings, which are burdensome both to the Commission and to the parties participating in our proceedings, we made it explicitly clear in our pioneer's preference rules and in the Report and Order that accompanied their adoption and in the subsequent Memorandum Opinion and Order that accompanied their reconsideration and amendment that, in our discretion, we will consider granting a pioneer's preference only for innovations of some significance and only to entities that have made a significant investment of effort in developing the innovation.[27] Within our rules we detailed specific information that all entities must provide in their request to

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[25] Public Notice No. 22536 (April 3, 1992).

[26] Ten applicants, all represented by the same law firm, filed a "Consolidated Petition for Reconsideration." In addition, ZN Group, Inc. (ZN), on June 24, 1992, requested reconsideration of the dismissal of its request. ZN's request was filed two days past the deadline for requesting reconsideration. PCS Network, Inc. (PCSN), on October 5, 1992, petitioned for reconsideration of the dismissal of its request. PCSN's request was filed more than three months past the deadline. See 47 C.F.R. §§ 1.4(b), 1.106. Neither petitioner requested waiver of the deadline. We dismiss both requests for failure to timely file their petitions.

[27] See, e.g., Low-Earth Orbit Satellites, supra note 4 at notes 8, 10.

permit informed public comment and our meaningful consideration of what we expected would be complex technical proposals incorporating leading edge technology. We reiterate that each requester has the burden of persuading us that its proposal is innovative, has merit, is technically feasible, and that it is the original developer and proponent of the innovation at issue.[28]

39. The information required to be submitted in the initial request is detailed at Section 1.402 of our Rules.[29] The requirements include, inter alia, (1) a description of the service to be provided; (2) a demonstration that the requester has developed the capabilities or possibilities of the technology, or has brought them to a more advanced or effective state; (3) a plan for implementing the service; (4) the frequencies it proposes to use; (5) a note of any conflicting licensing rules and how such rules should or should not apply; (6) the geographic area for which the preference is sought; and (7) a demonstration of the technical feasibility of the innovation, or an experimental license application or reference to one filed previously.

40. In their applications for review or petitions for reconsideration, each of the dismissed requesters asserts that the dismissal of their request is unwarranted because, inter alia, earlier-filed requests had been accepted for public comment that allegedly lacked similar information. This argument is unavailing. Any error made by the Commission's staff in making initial determinations of acceptability can be corrected at any later stage of the proceeding by dismissing or denying such a request. Acceptance of another's request, even if done in error, cannot be asserted as an excuse by a requester that itself does not comply with the filing requirements. Such a requester at most only may request the Commission to dismiss the other request for stated deficiencies.

41. We note that each of the pioneer preference requests cited by petitioners in support of their argument of disparate treatment was filed and accepted under our pioneer's preference rules as they existed before the effective date of amendments adopted by the Commission at its meeting on February 13, 1992. In the pioneer's preference Reconsideration Order adopted that day we prescribed a method for establishing a deadline to govern submission of preference requests.[30] Acting pursuant to the new rule, on April 3, 1992, the Commission by Public Notice

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[28] Id. at para. 13.

[29] 47 C.F.R. § 1.402.

[30] See Memorandum Opinion and Order, supra note 3.

announced that May 4, 1992, would be the last day for submission of pioneer's preference requests related to GEN Docket No. 90-314.[31]

42. As a consequence of this change in our rules and our subsequently establishing a deadline in this docket, those submitting requests after the change in our rules and issuance of the Public Notice were in a different position than those that had filed earlier. The later requesters filed with specific knowledge of the filing deadline, whereas when the earlier requesters filed there was no provision for such a deadline. The result is that under our rules, the earlier requesters knowingly had an unspecified additional period of time to file additional information, whether new or not, which could buttress or perfect their request. In effect, our rules permitted "place-holding" so long as sufficient information ultimately was filed. By contrast, those who applied after release of the Reconsideration Order and issuance of the Public Notice did so with full notice of the deadline for filing. We note that this notice was effective even as to earlier requesters whose requests had been accepted under the old rules, and it is notable that five of the 19 earlier requesters filed additional perfecting or supplemental information on or before the May 4, 1992 deadline.

43. We conclude that what the petitioners argue to be impermissible disparate treatment is, in fact, the consequence of changes to our rules that govern the process. In this regard we emphasize two points. First, at the filing stage, each request for pioneer's preference was judged only to determine its compliance with the minimal filing requirements specified in Section 1.402 of our Rules. Contrary to assertions made by some of the petitioners,[32] cursory review of the requests at the acceptance stage in no way entails evaluating even preliminarily the actual merits of any of the proposals. The assessment made at this stage is merely a preliminary review to determine whether the information required by the Commission's rules has been submitted. Second, all pioneer's preference requests evaluated in this proceeding have been analyzed pursuant to the new rules, either at the acceptance stage for those filed after the March 1992 effective date of the new rules, or in this Tentative Decision for all those that were accepted for public comment.

44. Finally, we note that later requesters had the significant benefit of the Commission's opinion in its first

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[31] Supra note 25.

[32] See, e.g., Consolidated Petition for Reconsideration filed by Adams Telcom, Inc. and nine additional parties at 11.

tentative pioneer's preference decision.[33] This decision, coupled with the Reconsideration Order, gave substantive guidance to requesters on the factors likely to be considered by the Commission and the weight that the Commission would give those factors.

45. We now turn to the additional arguments posited by some of the petitioners. Adams Telcom, Inc. et al (Adams) partially misconstrue the basis for dismissing its application. Adams argues that the action was based in part upon its not having submitted the results of an experiment. This was not a basis asserted for the dismissal. At the filing stage, our rules require only the submission of either a demonstration of technical feasibility or an experimental license application. At the time that we consider tentative award of a preference we require that a requester relying upon an experiment to demonstrate the technical feasibility of its proposal in place of a written technical submission have commenced its experiment and reported to us preliminary results.

46. Next, many of the petitioners argue that the Commission erred in its application of the following filing requirements:

> The applicant must demonstrate that it (or its predecessor-in-interest) has developed the new service or technology; e.g., that it (or its predecessor-in-interest) has developed the capabilities of the technology or service or has brought them to a more advanced or effective state.[34]

The petitioners before us misconstrue this basic tenet of the pioneer's preference rules. A preference is intended to reward accomplishment, not proposals. This was the underlying rationale expressed by the Commission when it adopted the preference rules, and is reflected in these rules. This rationale has been applied in all previous Tentative Decisions.

47. The key phrase is that an applicant "must demonstrate that it has developed the new service or technology." The Commission's rules clearly indicate that it requires claims to be based on work already accomplished. Consistent with its fundamental requirement that the award be for accomplishments and not proposals, in its Reconsideration Order the Commission clarified that its requirement with regard to accepting experiments in lieu of a technical feasibility showing meant that

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[33] See Low-Earth Orbit Satellites, supra note 4.

[34] 47 C.F.R. § 1.402(a).

at least preliminary results must be reported to the Commission before the Commission acts on the requests.

48. Consequently, statements by those requesting review, such as that contained in the Consolidated Petition that their requests "demonstrate not only a commitment to implementing and testing new technologies, but also to providing specific innovative communications services utilizing the new technologies within specific market areas" demonstrate the basis for the dismissal. Beyond failing to state with specificity even the type of technology to be considered or which from among the variety of services classified as PCS that requester intends to consider, the statements put into stark perspective the fact that their request fails to demonstrate what it has developed. Similarly, the duplicative petitions for reconsideration filed by Gateway Technologies, 2001 Technologies, Snowcap Communications, and Prospective Communications object to the dismissal of their requests because, inter alia, they each have "proposed" an experimental system. But nothing in their filing indicates compliance with our rule, supra, that they base their claim for a preference upon a demonstration that they have developed the proposed new service or technology.

49. Consequently, for the reasons stated above, we affirm each of the dismissals. In any event, we have reviewed each of the requests on their merits and determined that none would qualify for a tentative preference even if they were reinstated.

IV. PROCEDURAL MATTERS

50. Ex Parte Rules. This is a restricted proceeding. No ex parte presentations are permitted from the time the Commission adopts this Tentative Decision and requests comment until the proceeding has been finalized or until such decision or approval is no longer subject to reconsideration by the Commission or review by any court. In addition, no presentation, ex parte or otherwise, is permitted during the Sunshine Agenda period. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1208.

51. Accordingly, IT IS ORDERED THAT the applications for review filed by Citizens Utilities Company of California, and Electric Lightwave, Inc., ARE DENIED. IT IS FURTHER ORDERED THAT the petitions for reconsideration filed by Adams Telcom, Inc., Advanced Tel., Inc., Columbia Wireless Limited Partnership, East Ascension Telephone Company, Inc., Gateway Technologies, Inc., Globus Communications, Inc., LDH International, Inc., Middle Georgia Personal Communications, Inc., Paramount Wireless Limited Partnership, Prospective Communications, Inc., Reserve Communications and Computer Corp., Reserve Telephone Company, Inc., Rock Hill Telephone Company, San Marcos Telephone Company, Inc., Snowcap Communications, Inc., TeleCable Corporation, Tri-

Star Communications, Inc., 2001 Technologies, Inc., and Wireless Communications Services, Inc., ARE DENIED. IT IS FURTHER ORDERED THAT the petitions for reconsideration filed by PCS Network, Inc. and ZN Group, Inc. ARE DISMISSED.

52. This action is taken pursuant to Sections 4(i), 7(a), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(g), and 303(r).

53. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 29, 1993, and reply comments on or before March 1, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

54. For further information concerning this rule making contact Thomas Derenge, (202) 653-7605, Office of Engineering and Technology, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

October 8, 1992

Concurring Statement
of
Commissioner Ervin S. Duggan

In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services -- Pioneer's Preferences

When the Commission established its pioneer's preference program last year, I issued a separate statement to emphasize my concerns about awarding dispositive license grants for new technologies. While I expressed my eagerness to encourage new technological developments, I suggested that "as we go forward with this new venture. . . [we] keep a shrewd eye trained on the dangers as well as its promise."

At that time, I cited the following potential dangers:

* "the danger of politicizing awards that should be impartial";

* "the danger of distracting ourselves with hair-splitting debates about what constitutes real newness, novelty and pioneering"; and

* "the danger of bogging the Commission down in administrative litigation that instead of speeding, delays its efforts to foster new communications services in the public interest."

As the Commission has moved forward with specific pioneer's preference awards, I have hoped that my misgivings would subside. Instead they have increased, especially as we've attempted to discern the relative merits of a large number of applicants. Close observers who attend to comments from the bench will note that I am not alone. My colleagues have expressed similar concerns: concerns that are more emphatic when spoken privately. The collective decision of the Chairman and Commissioners not to receive visits from pioneer's preference applicants, for example, seems to me symptomatic of an underlying uneasiness with the dangers that hang over this new enterprise of ours.

I am aware that it is unusual to voice such deep reservations at this stage. I know that I have already ratified a number of Commission actions concerning the pioneer's preference--- in the hope that my misgivings were exaggerated and that the program could work. Indeed, I remain committed to the underlying goal of encouraging innovation, and I believe that it is fair to prefer those who invent and who show initiative in our licensing process. Nevertheless, without challenging the merits

of the tentative awards adopted in this item, I concur in this decision as a way of underscoring my continuing doubts about pioneer's preferences.

At this juncture, I would personally prefer to award pioneer's preferences only rarely, in cases of conspicuous and spectacular breakthroughs, and perhaps to award preferences that would advance applicants in the licensing process without becoming dispositive license grants. I hope that my colleagues will consider reviewing or modifying this program in some way before we have traveled too far down this road.

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October 8, 1992

Separate Statement

of

Commissioner Andrew C. Barrett

Re: Amendment of the Commission's Rules to Establish New Personal Communications Services; Tentative Decision and Memorandum Opinion and Order [Order]. [Gen. Docket No. 90-314]

I have supported the Pioneer Preference docket from its inception. In two previous pioneer preference decisions in the Low Earth Orbit satellite dockets, I was comfortable with the thorough process of review that lead to those actions. In both of those situations, there were fewer pioneer preference applications and different considerations. With this action today, there are several factors that make me less comfortable with our decision. First, we have received 96 pioneer preference requests from various parties involved in the PCS docket. The Office of Engineering and Technology accepted 57 of these applications and dismissed thirty nine. Of the 57 accepted, we evaluated those and tentatively have picked 3 entities to receive a pioneer preference for Personal Communications Services [PCS].[1] I would feel more comfortable with this decision if the distinctions between those tentatively selected and those tentatively denied were more clear, particularly where extensive experimental efforts have occurred. Where distinctions between the entities tentatively selected and other entities are not as clear, I question, as a policy matter, whether the Commission should tailor its pioneer preference criteria to the specific characteristics of each docket. For example, in this case, where there are numerous pioneer preference applicants, I question whether we previously should have issued a public notice to solicit comment on the appropriate specific technical criteria for selecting PCS pioneers. Second, where it is difficult to make significant distinctions between pioneering efforts, I question whether we should award a larger number of pioneer preferences. If so, we need to understand the impact that decision could have on the ultimate licensing scheme in any particular docket. Where pioneering selectees could become the exclusive licensee for a large service area, I become more concerned. If multiple licensees eventually will compete in the service area, I am less concerned.

If this were not a tentative decision, I would not feel comfortable supporting it. As I have stated in the past[2], I believe that our pioneer preference docket needs to be strengthened to ensure adequate standards are used to evaluate

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[1] See Order at 11.

[2] See, Separate Statement of Commissioner Andrew C. Barrett, [ET Docket 92-28], Aug. 5, 1992.

applications in various dockets. Where there are a significant number of pioneer preference applications, as in this case, and where the distinctions are not as clear between various applicants who have conducted extensive experiments, then I am concerned that our process of review is thorough and specifically tailored to this effort. Given the distinctions in technologies and service formats between various dockets involving new services, I am not certain that one case will serve as precedent for a future case in the pioneer preference area. Thus, where there are completely different factors involved in each case, it may be necessary for the Commission to develop specific technical review criteria prior to making a tentative decision in each docket. I look forward to reviewing the comments to our tentative pioneer preference decisions in PCS. I hope that commenters also will analyze how the Commission can strengthen its effort in this area.

*U.S. Government Printing Office: 1992 — 342-145/80006